FILED
SEP 22 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 440

JOHN H. ODENBACH,

Petitioner,

and

44.00 ACRES OF LAND, MORE OR LESS, SITUATE IN THE TOWN OF GREECE, COUNTY OF MONROE, STATE OF NEW YORK,

Defendant,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JESSE CLIMENKO,
Counsel for Petitioner,
30 Broad Street,
New York 4, New York.

FREDERICK WIEDMAN,
CHARLES MERCER,
ARTHUR S. FRIEDMAN,
Of Counsel.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	3
Reasons for granting the writ	8
Conclusion	22
Appendix A	1b
Appendix B	3b

CASES

Adamson v. *County of Los Angeles*, 52 Cal. App. 125	18
Bulacan v. *Aduna*, 42 Philippine 248	17
C. Scheerer & Co. v. *Hutton*, 7 Cal. App. 524	18
City of Manila v. *Estrada*, 25 Philippine 208	17
City of Ft. Scott v. *Hickman*, 112 U. S. 150	16
Coates v. *Commissioner of Internal Revenue*, 234 F. 2d 459	14
Ferroline Corp. v. *General Aniline & Film Corp.*, 207 F. 2d 912, cert. den. 347 U. S. 953, reh. den. 347 U. S. 979, reh. den. 348 U. S. 851	14
Fountain v. *Filson*, 336 U. S. 681, reh. den. 337 U. S. 921	22
Georgia Ry. & Elec. Co. v. *Decatur*, 295 U. S. 165	22

PAGE

Hall v. *City of Meriden*, 48 Conn. 416 17-18

In re Grading of Liberty Street, 11 Pa. Dist. Rep. 488 17-18
In re Rich, 134 F. 2d 779, cert. den. 320 U. S. 748 .. 14

Matter of Hamd Street, 52 Hun (N. Y.) 206 18
McComb v. *Blue Star Auto Stores, Inc.*, 164 F. 2d 329, cert. den. 332 U. S. 855 16
Morris Plan Industrial Bank v. *Henderson*, 131 F. 2d 975 14
Mt. Clements Pottery Co. v. *Anderson*, 328 U. S. 680 13

O'Malley v. *Ames*, 197 F. 2d 256 12

Pacific Portland Cement Co. v. *Food Machinery & Chemical Corp.*, 178 F. 2d 541 16
Paris v. *Central Chiclera S. De R. L.*, 193 F. 2d 960 15

Sanitary Farm Dairies v. *Gammel*, 195 F. 2d 106 .....12, 13, 14
Saunders v. *Shaw*, 244 U. S. 217 22
Simmonds v. *United States*, 199 F. 2d 305 12
Stewart v. *Southern Ry. Co.*, 315 U. S. 283, pet. for reh. gtd. and case remanded 315 U. S. 784 22

Thornton v. *Carter*, 109 F. 2d 316 15

United States v. *Beard's Erie Basin, Inc.*, 157 F. 2d 956 13
United States v. *Brooklyn Union Gas Co.*, 168 F. 2d 391 .....17, 22
United States v. *Certain Lands in City of Newark*, 183 F. 2d 320 12
United States v. *Certain Parcels of Land in City of Philadelphia*, 215 F. 2d 140 .....10, 11, 12

PAGE

United States v. *Hirsch*, 113 F. Supp. 465, aff'd 206 F. 2d 289 ..... 10, 11, 12

United States v. *10,064.97 Acres of Land*, 12 F. R. D. 393, aff'd *sub nom. United States* v. *Waymire*, 202 F. 2d 550 18

United States v. *Village of Highland Falls*, 154 F. 2d 224, cert. den. 329 U. S. 720 ..... 12, 14

United States v. *Wallace*, 201 F. 2d 65 13

RULES

Federal Rules of Civil Procedure, 28 U. S. C.

Rule 53(e)(2) 2, 3, 10, 11, 13, 14, 18, 19, 21

Rule 71A(h) 2, 3, 4, 10, 12, 13, 15, 16, 19, 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. .....

JOHN H. ODENBACH,

Petitioner,

and

44.00 ACRES OF LAND, MORE OR LESS, SITUATE IN THE TOWN OF GREECE, COUNTY OF MONROE, STATE OF NEW YORK,

Defendant,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on June 12, 1956.

Citations to Opinions Below

The two Reports of the Commission of Appraisal (2508a*, 2558a) are not officially reported and are printed

* References in parentheses are to pages of Joint Appendix unless otherwise noted.

herein in Appendix B, *infra*, pages 3b-24b. The Opinion of the District Court (2572a, 2577a) is unreported, although it is set out *verbatim* in the Opinion of the Court of Appeals. It is printed herein in Appendix B, *infra*, pp. 34b-38b. The Opinion of the Court of Appeals is reported at 234 F. 2d 410 and is printed in Appendix B hereof, *infra*, pages 32b-45b.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on June 12, 1956 (*infra*, p. 46b). Timely petition for rehearing in accordance with the Rules of that Court was filed on behalf of Petitioner on June 20, 1956 (*infra*, p. 48b). Rehearing was denied on July 2, 1956 (*infra*, p. 55b). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Questions Presented

1. In a Commission-tried Federal condemnation proceeding, governed by Rules 71A(h) and 53(e)(2) of the Federal Rules of Civil Procedure, 28 U. S. C.

a. May a part of a determination of just compensation be held "clearly erroneous", absent any charge against the Commission of bad faith, and despite the Commission's express statements that it considered all the evidence and followed valuation law held by the District Court to be correct, on the ground that the Commission gave "undue weight" to certain expert testimony?

b. May another part of a determination of just compensation arrived at by a Commission of Appraisal be vacated in the absence of any finding by the District Court that the determination was "clearly erroneous"?

2. After the rejection of a Commission's determination of just compensation,

a. May the District Court summarily substitute its own *de novo* determinations of just compensation under the power to "modify" contained in Rule 53(e)(2) of the Federal Rules of Civil Procedure and thereby reduce the Commission's determination by $727,750.040, or almost 50 percent or, to the contrary, must the matter be remanded either to a commission or a jury for a new initial determination of just compensation?

b. If the District Court may summarily make *de novo* findings of just compensation under its power to "modify", is Petitioner deprived of his natural right to participate in the trial where the *de novo* findings are made by the District Court on a Record from which the bulk of Petitioner's evidence, which had been ruled competent by the Commission, is stricken by the District Court on its review, and Petitioner is not afforded any opportunity to adduce testimony at a new hearing which would be competent by the District Court's own evidentiary standards?

Statute Involved

The pertinent provisions of the Federal Rules of Civil Procedure, 28 U. S. C., are Rules 71A(h) and 53(e)(2). They are printed in Appendix A, *infra*, page 1b.

Statement

This action to condemn improved property for military purposes (50 U. S. C. Section 171, 40 U. S. C. Section 257), was commenced by the filing on December 27, 1951 of Respondent's Petition in condemnation in the District Court for the Western District of New York (1a, 7a).

The property consists of 44 acres of land, together with improvements—a large, integrated heavy industrial unit

built in 1943-44 (2515a). It is located in the County of Monroe, State of New York, some eight miles from the City of Rochester, on Lake Ontario (8a, 1063a, 2041a). On February 13, 1952, Petitioner filed Answer to the Petition in condemnation (17a), and prayed for a determination of just compensation in the sum of $2,350,000. The Answer demanded a trial by jury on the issue of just compensation, as provided in Rule 71A(h) of the Federal Rules of Civil Procedure (19a).

On application by Respondent, the District Court ordered the issue of just compensation to be tried by a Commission of Appraisal. It designated three persons so to act* (104a).

The Commission held hearings on the issue of just compensation and inspected the property on three occasions (2509a, 2589a *et seq.*). The hearings commenced in August 1953 and concluded in July 1954. The Transcript totalled 4,055 pages.

Respondent, of its own choice, presented its evidence to the Commission first (106a). That evidence consisted of expert testimony on three theories of valuation, *i. e.*, comparable sales, income capitalization and reproduction cost new less depreciation. By far, the largest part of Respondent's expert testimony was on the theory last named. Respondent also introduced evidence concerning certain alleged prior sales of the property. No witness for Respondent testified to a value of less than $644,000.

Petitioner presented his evidence to the Commission on the theory of reproduction cost new less depreciation alone. Petitioner submitted evidence to the Commission that there was no going "market" for similar heavy industrial properties (1459a, 1577a, 1632a, 1633a, 1635a,

---

* One was a former Justice of the Supreme Court of the State of New York, and presently a practicing attorney; the second was a practicing attorney, and the third was an insurance broker.

1636a, 1846a, 1847a, 2239a, 2245a). Identical evidence had also been brought into the Record by Respondent's own witnesses.*

The Commission made its unanimous Report of just compensation on December 23, 1954 (*infra,* 3b). The District Court ordered the Commission to file findings of fact and conclusions of law (2539a), which were filed in a second Report dated February 7, 1955 (*infra,* 13b).

The Commission stated that its determination of just compensation "includes all elements of value that inhere in the property but it does not exceed market value fairly determined." "Market value is the amount a willing buyer will pay in cash to a willing seller" (*infra,* 13b). The Commission stated that having heard testimony based on three theories of valuation, it did not arrive at its determination on the basis of any one theory alone (*infra,* 14b, 17b, 18b, 19b, 20b).

The Commission further stated that it had considered the property's geographical location, its access to roads and railroads, the availability to it of utilities, its views of the property, the condition of the property as established by the testimony of the witnesses, the Condition Survey expected by the Corps of Engineers on behalf of Respondent, and photographs of the property which had been introduced in evidence. The Commission explicitly stated that its ultimate determination of value was based upon all of the competent evidence in the Record

---

* Before a single one of Petitioner's witnesses testified, one of Respondent's expert witnesses had said: (1459a)

"Mr. Corbett: Do you consider that this property is unique and cannot be valued in the usual manner?

The Witness: I certainly do.

Mr. Corbett: Therefore, you do not feel that the willing buyer and willing seller approach is the proper approach to valuation?

The Witness: Not from the sales angle."

aimed at the result of knowing what a willing informed buyer would pay a willing informed seller for the property (*infra*, 21b).

In contrast to the owner's evidence of value of land and improvements in a sum in excess of $2,100,000 and Respondent's evidence of a value of approximately $650,000.00, the Commission reported just compensation for lands and improvements of $1,367,250.00. It reported $66,300.00 as the value of severance damage, and $54,978.35 as the fair rental value of the property for the period required to be determined by the Order of the District Court. The aggregate determination of just compensation by the Commission was $1,488,528.35 (*infra*, 23b, 24b).

The District Court rejected the Reports of the Commission (*infra*, 24b *et seq.*). It acknowledged that the Commission had professed to have been guided by correct principles of law (*infra*, 36b). Nevertheless, the District Court ruled that the Commission had relied on reproduction cost testimony alone (*infra*, 36b). It held that the Commission's findings were against the weight of the evidence and were clearly erroneous (*infra*, 36b; 2577a).

The District Court further held that Petitioner's only expert witness on the value of the improvements was disqualified and excised his testimony from the Record (2577a, 2578a, 2518a, *et seq.*, 2553a, *et seq.*). It then proceeded, without affording to Petitioner any opportunity for a new hearing at which expert testimony satisfactory by the Court's own standards might be adduced on his behalf, and on a Record in which Petitioner had no remaining expert testimony on the value of improvements, to promulgate *de novo* vastly reduced findings of just compensation* (*infra*, 37b, 38b). The District Court's substituted determination of just compensation aggregated $760,778.35, an

---

* Respondent had not even previously moved the District Court to make a new determination. Respondent's motion addressed to the Commission's Reports sought merely to have them set aside (2529a).

overall reduction of $727,750.00 from that reported by the Commission.

To arrive at this result the District Court accepted Government witnesses' testimony of so-called "functional depreciation" of some $500,000.00 as the sole truth, in the face of the testimony of three most highly qualified witnesses that this was a modern unit very adaptable to heavy industry and without any functional depreciation.

The Opinion and Orders of the District Court, neither directly nor indirectly, held the Commission's determination of just compensation for fair rental value or severance damage to be clearly erroneous. Nevertheless, the District Court promulgated reduced determinations of just compensation for these two items (*infra*, 37b, 38b).

Petitioner's Motion for a new trial was denied by the District Court (2579a, *et seq.*, 2595a).

The Court of Appeals for the Second Circuit affirmed the Orders of the District Court. It affirmed because it held that the Commissioners, despite their statement that they followed proper rules of law, nevertheless relied primarily on reproduction cost new less depreciation testimony (*infra*, pp. 40b, 55b). The Court below concluded that the Commission gave "undue weight" to this testimony. While the Court below acknowledged that the District Court had the discretion to remand the matter to the Commission for revised findings after the rejection of its Report, nevertheless, it held that the District Court was not obliged so to do (*infra*, p. 40b). The Court further held that it was immaterial that the District Court made new findings as to severance and rental value without finding first that the Commission's determinations in those respects were clearly erroneous (*infra*, p. 40b). In plain effect the Court below exercised its reviewing functions as if the District Court was an original trial Court.*

* It is interesting to note that the Opinion below refers to the District Court as the "trial judge" on no fewer than seven occasions. (*Infra*, 34b, 40b, 41b, 55b.)

Reasons for Granting the Writ

The Court below ruled in effect that a District Judge can disagree with a Federal condemnation commission's findings made upon substantial and competent evidence, can question the weight of evidence, and even conjecture that the commission's mind operated otherwise than its carefully considered and written statement thereto, and that he can thereupon proceed to set aside their award and render his own opinion as to valuation and make his own award without being confronted with the witnesses. If such procedure as used in this case is allowed to stand as the law, the door has been opened to all District Judges to divest the landowner of his historical right to a trial by jury, or its substitute federal condemnation commission, in valuing just compensation.

If this procedure stands, the traditional function of a condemnation commission as the initial finder of just compensation, and, presumptively, the final determiner thereof, is completely destroyed. In its place there stands a condemnation procedure involving two separate and distinct trials, the first of which by a Commission is of no abiding significance whatever, and the second of which by the District Court, on a cold record and without benefit of a view of the property, is characterized by unlimited power of *de novo* determination of the issue.

(1)

With regard to the finding of just compensation for the land and improvements, the Court below ruled:

> "It is obvious to us, and it was to the judge, that in valuing the property, the Commissioners (despite their statement that they took all pertinent factors into consideration) relied primarily on reproduction-cost-new less depreciation." (*infra*, p. 40b)

In its Order denying Petitioner's Petition for rehearing, the Court below held: "• • • that the trial judge

correctly rejected the undue weight" placed on reproduction cost by the Commissioners* (*infra*, p. 55b).

As the quotations from the Opinion of the Court below and the District Court clearly indicate, the Commission itself expressly declared in its Reports that in reaching its determination of fair market value, it had not been guided by any single theory of valuation, *i. e.*, reproduction cost, to the exclusion of others.**

The Commission specifically reported (*infra*, 21b):

> "The ultimate determination of value by the Commission, on all the competent evidence, including physical, functional and economic depreciation of the buildings, was based on its conception of what an informed willing buyer would pay an informed willing seller for this entire property * * *."

It further stated (*infra*, 19b):

> "It agreed with and adopted the suggestion advanced by the attorneys for the Government throughout the trial of the case * * * that there was no mathematical formula that could be adopted as a basis for valuation but that the Commission should consider all the evidence that would influence a prospective purchaser or seller of this property in arriving at a determination of market value and that, after giving such weight as it determined each type of evidence was entitled to, the Commission should reach its determination of fair market value."

---

* The District Court held (*infra*, 36b):

> "Despite the statement of the Commissioners that they took into consideration all pertinent factors in arriving at their determination of fair market value, I think the amount of the award demonstrates that they erroneously arrived at their conclusion by adopting the condemnee's theory of valuation, *viz.*, that there was no going market for the property and that land value plus reproduction cost less physical depreciation was the sole guide."

** Both the Court below and the District Court specifically held that evidence of cost of reproduction in this case was admissible.

The holding of the Court below, and that of the District Court, predicates a finding of "clear error" on a belief, contrary to the Commission's express declarations, that exclusive or virtually exclusive reliance was placed by the Commission on one species of value testimony alone. On that premise, the Commission's Reports were rejected. It is submitted that this predicate for affirmance in the holding of the Court below is squarely in conflict with at least two holdings of Courts of Appeal construing Rule 71A(h) and Rule 53(e)(2).

> *United States* v. *Certain Parcels of Land in City of Philadelphia*, 215 F. 2d 140 (C. A. 3d, 1954); *United States* v. *Hirsch*, 113 F. Supp. 465 (D. C., D., Conn., 1952); aff'd. 206 F. 2d 289 (C. A. 2d, 1953).

In the former case, from the Third Circuit, tried by a Commission under Rule 71A, it was argued that the Commission's determination was erroneous because it had been arrived at by a certain *admittedly erroneous* calculation. Nevertheless, the Court held (p. 145):

> "In arguing that the first Report is 'meaningless,' the owners are insisting that the figure of $309,000 could have been arrived at only by making the mistake in computation pointed out in our footnote I. This is not necessarily true for the amount arrived at by the Commissioners might have been a pure coincidence. But even if the long arm of coincidence may not fairly be deemed to reach so far and the Commissioners actually arrived at the $309,000 figure in the way the owners suggest they did, the Commissioners' valuation is nevertheless sustainable if in fact all the other elements having nothing to do with rental were actually taken into consideration by the Commissioners. The important point, however, is that the Commissioners in their second Report emphasize that $309,000 was their fair estimate of the value of the Merchants Exchange, with each and every element

of value considered. This statement by the Commissioners constitutes an explanation of what they did and how they did it, and in the absence of an allegation of bad faith, which the owners do not make, the Commissioners' computation should stand. Cf. Baetjer v. United States, 1 Cir. 1944, 143 F. 2d 391, at p. 394; United States v. Hirsch, 2 Cir. 1953, 206 F. 2d 289, 294. And see United States v. Miller, 1943, 317 U. S. 369, 374, 763 S. Ct. 276, 87 L. Ed. 336."

In *Hirsch,* from the Second Circuit, a similar contention was advanced where the Government urged that the Report was arrived at primarily as the result of one particular piece of evidence which, it was argued, made the Report clearly erroneous. The Court rejected the argument, saying, at p. 466:

> " 'To be sure, the Committee's report concerns itself primarily with the Aveo negotiations, and there is no doubt that they played a big part in the determination of the final award. But it would be unwarranted to ascribe to the Committee a method which is not evident either in the record or in the memorandum, and, indeed, which would necessitate an assumption on the Court's part which could only be based on speculation.' "

It is submitted that the holdings of the Third Circuit case and of the earlier *Hirsch* case in the Second Circuit are directly and squarely inconsistent with the holding of the Court below. In the instant case, not only was the alleged method of valuation ascribed by the District Court and the Court below to the Commission not apparent on the face of the Record, but it was expressly contrary to the Commission's admittedly proper statement of its method of valuation, as contained in its Reports.

It is further submitted that the holding of the Court below is quite probably in conflict with decisions under Rule 53(e)(2) which hold that "clear error" is not established simply because of a disagreement between the Dis-

trict Court and the Commission over the "weight" of the evidence (*Simmonds* v. *United States,* 199 F. 2d 305, 307 [C. A. 9th, 1952]; *O'Malley* v. *Ames,* 197 F. 2d 256 [C. A. 8th; 1952]; *Sanitary Farm Dairies* v. *Gammel,* 195 F. 2d 106, 117 (C. A. 8th, 1952), particularly where the Commission's award is within the range of the evidence (*United States* v. *Certain Lands in City of Newark,* 183 F. 2d 320, 322 [C. A. 3d, 1950]).

In the *United States* v. *Village of Highland Falls,* 154 F. 2d 224 (C. A. 2d, 1946) cert. den. 329 U. S. 720, Judge Learned Hand, after observing that (at 227):

> " 'Unlike a jury, they are not restricted to any particular species of evidence. The authorities are unanimous that they are privileged to act on their own judgment and information obtained from an inspection of the property, as well as on the evidence produced before them.' "

concluded (at 228):

> "It follows that the award of such a commission is nearly immune from judicial review, because the record on which that review must be made does not contain all the evidence."

It is submitted that the decisions in the *Certain Parcels* and *Hirsch* cases are correct, and that the decision of the Court below is in error. This holding of the Court below, together with that stated in (2) below, projects a question of a serious consequence to the course of Federal condemnation procedure under Rule 71A(h). These holdings touch the very heart of Commission procedure and District Court review thereof.

In effect, the holding of the Court below delimits a status for a condemnation commission under the Rule of no greater dignity than that of a taker and reporter of testimony. Particularly in condemnation procedures, where appraisal commissions view the property and traditionally have had the highest presumption of correctness

attached to their findings of just compensation, this Court, which has not passed upon this question under Rule 71A, should settle this important question, and resolve the conflict presented by the cited decisions. See also: *United States* v. *Wallace,* 201 F. 2d 65, 67 (C. A. 10th, 1952). (*United States* v. *Beard's Erie Basin Inc.* 157 F. 2d 956 [C. A. 2d, 1946].)

(2)

The Court below held it immaterial that the District Court did not determine that the Commission's findings of severance damage and fair rental value were "clearly erroneous" as a predicate to its substitution of new findings* (*infra,* p. 40b). The Court below disposed of Petitioner's arguments on this point by holding that the District Court's *de novo* findings of just compensation were "amply supported by the evidence" (*infra,* p. 40b).

The holding of the Court below sanctions a serious departure by the District Court from the accepted and usual standard of review required by Rule 53(e)(2) of the Federal Rules of Civil Procedure. It conflicts with holdings of this Court and numerous holdings of the Circuit Courts of Appeal. *Mt. Clements Pottery Co.* v. *Anderson,* 328 U. S. 680 (1946); *Sanitary Farm Dairies* v. *Gammel,* 195

---

* Unlike the District Court's rejection of the Commission's finding of just compensation for the land and improvements, wherein the District Court eliminated virtually all of Petitioner's evidence on the enhancement of land by the improvements, the evidence submitted by Petitioner on severance damage and fair rental value was not challenged as to competence. The Commission's findings on those two subjects were well within the range of the admissible competent testimony, the figures being:

	Respondent's Testimony	*Petitioner's Testimony*	*Commission's Finding*	*Court's Substitute Finding*
Severance Damage	$20,895	$191,610	$66,300	$25,000
Fair Rental Value	37,256	91,416	61,200	35,778

The fact is that the District Court did not, explicitly or otherwise, hold the Commission's findings on severance damage and fair rental value to be "clearly erroneous." It did not even hold them to be excessive.

F. 2d 106, 117 (C. A. 8th, 1952); *United States* v. *Village of Highland Falls,* 154 F. 2d 224 (C. A. 2d, 1946), cert. den. 329 U. S. 720. See also: *Coates* v. *Commissioner of Internal Revenue,* 234 F. 2d 459, 462 (C. A. 8th, 1956).

The Court below did not properly discharge its responsibility for reviewing the correctness of the District Court's rejection of the Commission's Report, by affirming the District Court's Opinion on the basis of a holding that the District Court's substitute findings were not in themselves clearly erroneous. That was an entirely different question. The traditional rule is clearly established that the initial question in the Court of Appeals is the same as the question originally in the District Court, viz., were the findings of the Commission or Master clearly erroneous? *Morris Plan Industrial Bank* v. *Henderson,* 131 F. 2d 975 (C. A. 2d, 1942); *In re Rich,* 134 F. 2d 779 (C. A. 2d, 1943) cert. den. 320 U. S. 748; *Sanitary Farm Dairies* v. *Gammel, supra.* See also: *Ferroline Corp.* v. *General Aniline & Film Corp.,* 207 F. 2d 912, (C. A. 7th, 1953) cert. den. 347 U. S. 953, reh. den. 347 U. S. 979, reh. den. 348 U. S. 851. As between two sets of alternative permissible findings, District Court rejection of those reported by a Commission cannot be justified by a holding of the propriety of the District Court's alternate findings.

By failing to apply this test, the holding below plainly sanctions the District Court's unlimited right to substitute *de novo* findings of fact in place of those reported by a master or commission. It sanctions the complete and unfettered assumption by the District Court of the functions of a jury or commission, and what is more, without confronting the witnesses. There is no parallel for such procedure in the law, whether in a jury trial, or before a master, or a commission.

The holding below plainly contravenes the requirement of Rule 53(e)(2), that findings of fact by a Commission must be accepted unless found to be "clearly erroneous." As such, the holding marks a wholly new definition of Commission (or master)—District Court relationship in the context of Rule 53 review.

The ramifications of the holding below in this respect would *prima facie* be applicable in all cases involving references to masters, as well as determinations by commissions under Rule 71A(h). The extent of the departure of the Court below from previous decisions of this Court and other Circuit Courts, and the novelty of the holding, urgently require correction by this Court in the interest of proper judicial administration of the Federal Rules of Civil Procedure.

(3)

The Court below affirmed the District Court's summary promulgation of *de novo*, independent findings of just compensation in place of those reported by the Commission.* Presumably the door is now open under the Rules for the District Court to increase as well as decrease commission determinations of just compensation.

It is submitted that the making of a *de novo* fact determination of just compensation, as a matter of first impression, under the guise of "modification", conflicts with numerous decisions of various Courts of Appeal which have held that the power to "modify" is limited to a power to correct minor, insubstantial and virtually undisputed errors contained in the determination under review.

See:

Thornton v. *Carter*, 109 F. 2d 316, 319 (C. A. 8th, 1940);

Paris v. *Central Chiclera, S. De R. L.*, 193 F. 2d 960, 963 (C. A. 5th, 1952);

---

* The Court below acknowledged that the substitute determinations were new determinations of fact by specifically holding them not to be "clearly erroneous." Had the District Court's substitute findings been otherwise, plainly the "clearly erroneous" test would not have been invoked.

Pacific Portland Cement Co. v. *Food Machinery & Chemical Corp.*, 178 F. 2d 541, 548 (C. A. 9th, 1949);

McComb v. *Blue Star Auto Stores, Inc.*, 164 F. 2d 329 (C. A. 7th, 1947), cert. den., 332 U. S. 855.

See also:

City of Ft. Scott v. *Hickman*, 112 U. S. 150 (1884);

Rule 71A(h) specifically confers upon the condemnee a right to trial by jury on the issue of just compensation, subject to defeasance only in the event that the Court determines that a Commission is required. It is plain, therefore, that where as here, the condemnee files timely demand for jury trial on the issue of just compensation, the District Court cannot, as it did here, make that initial fact finding. The Rule specifically states that trial of all issues is "otherwise" to be by the Court.

If a preliminary finding of clear error on the part of a Commission is held to mean that the reviewing Court may then proceed as if it were in the first instance the body entrusted by the Rule for the determination of just compensation, the rights of the condemnee are seriously impinged. The slightest clear error by the Commission opens the door to a wholly new weight evaluation of just compensation by the reviewing Court.* It is submitted

---

* An over-simplified example of this might involve a case where the range of testimony on value was between $3.00 and $10.00. For some reason, the Commission reported a value of $11.00. The holding of the Court below would establish the District Court's right to make an entirely new determination of a value at any point between $3.00 and $10.00. The holding in the *Waymire* case, *infra*, would merely permit the reduction of the Commission's award to the maximum limit of the evidence.

A situation completely analogous to the example is present here. The Record plainly shows that even allowing the deletions of evidence ordered by the District Court, and without reference to the clear rebuttal of gigantic deductions taken by all of Respondent's witnesses for alleged functional depreciation, the highest remaining expert testimony aggregated $821,000 rather than the $700,000 substituted by the District Court.

that this result is also in conflict with prior holdings of the Court of Appeals for the Second Circuit where the same kind of situation was held to require a remand for new determinations of fact to the initial trier of fact, subject to ordinary review, rather than a substitution of a new finding in the first instance by the reviewing Court. *United States* v. *Brooklyn Union Gas Co.*, 168 F. 2d 391, 398 (C. A. 2nd, 1948).*

The only permissible action which the District Court may take is analogous to a *remittitur*, conditioned on the option to the condemnee for a new trial in place of acceptance of the reduction ordered. This was not done here.

Power summarily to make new findings of just compensation cannot properly be inferred at the reviewing Court level. Compare: *Tennessee Valley Authority Act* (Title 16 U .S. C. A., Section 831x).

It was argued by Respondent that the power of the District Court to increase or decrease the *quantum* of a Commission's finding of just compensation inhered in the District Court by virtue of its power to "modify" (Rule 53(e)(2). Nevertheless, Respondent conceded that "in the absence of clearly stated authority" the District Court would not have the right to increase or decrease the amount of a Commission's award. Despite the fact that the Court below did not expressly pass upon this novel question in its Opinion, the few non-Federal cases which were cited by Respondent in support of the "clearly stated authority" were in each and every instance distinguishable from the case at bar. The cases were: *Bulacan* v. *Aduna*, 42 Philippine 248 (1921); *City of Manila* v. *Estrada*, 25 Philippine 208 (1913); *In re Grading of Liberty Street*, 11 Pa. Dist. Rep. 488 (1902); *Hall* v. *City of Meriden*, 48 Conn.

---

* To the extent that the Court below held that the Commission erred in according "undue weight" to certain evidence, plainly the District Court's correction of this error involved a new weighing of the evidence—a functioning as an original trier of fact.

416 (1880); *C. Scheerer & Co.* v. *Hutton,* 7 Cal. App. 524 (1908); *Matter of Hand Street,* 52 Hun. (N. Y.) 206 (1889); *Adamson* v. *County of Los Angeles,* 52 Cal. App. 125 (1921).

In the Philippine cases, the statutory authority was different from that encountered in Rule 53(e)(2). Philippine Code of Civil Procedure, §§ 245, 246.

In the *Liberty Street* case, the law under which the Court operated not only conferred a power to "modify," but specifically conferred a power to "change the assessments made therein" (Pennsylvania Public Law 75, § 6, Laws of 1891). The contrast with Rule 53(e)2 is apparent. Rule 53(e)2 does not have the additional language conferring a power to "change" an award.

The same was true in the *Hall* case where the Court specifically said, at p. 426, that the section in question explicitly gave the Court power to reassess the damages and give judgment accordingly.

In the *Scheerer* and *Hand Street* cases the question was not one of *quantum* of compensation, but rather a question of whether the claimant was entitled to any compensation as a person with a compensable interest in the property.

The *Adamson* case clearly shows that contrary to Respondent's contention below, the Court increased the award only by way of *additur,* and the increase was made with the condemnor's consent as a condition to the denial of a motion made by the owner for a new trial. This is precisely one of the alternatives which we contend here was available to the District Court.

The only federal case decided in the Circuit Courts since the adoption of Rule 71A, dealing with this question, is apparently *contra* Respondent's contentions.

> *United States* v. *10,064.97 Acres of Land,* 12 F. R. D. 393 (D. C., D. Wyoming 1952), aff'd. *sub nom. United States* v. *Waymire,* 202 F. 2d 550 (C. A. 10th, 1953).

It is believed that the affirmance by the Court below of the District Court's power to substitute *de novo* findings of just compensation for those of a Commission is a determination of first impression in the Courts of Appeal under Rule 71A(h) and Rule 53(e)(2). The fundamental issue has not been passed on by this Court. It is an issue of such importance in the administration of Federal condemnation procedure, and one which so fundamentally affects the method of trial and review in all commission-tried Federal condemnation cases, as well as ordinary cases of reference to masters, that this Court should settle this important question of Federal law.

(4)

The District Court, on its review of the Commission's Reports, held that the testimony of Petitioner's only expert witness on the value of improvements was incompetent and ordered it stricken (2577a, 2578a, 2518a *et seq.*, 2553a *et seq.*). The Record upon which the District Court made its summary, substitute *de novo* findings of fact, therefore, was devoid of this substantial portion of Petitioner's testimony.*

The objections to this expert witness' testimony made by Respondent before the District Court had previously been made to the Commission. These objections were all

---

* The avowed bases for the excision of this testimony by the District Court were that the witness, although a qualified engineer, was otherwise unqualified to testify to market value because, among other things, he was not a resident of the State of New York, was not a licensed engineer in the State of New York, had not bought and sold real property, and had given his opinion that the property was functionally good. Furthermore, the District Court held that this witness' testimony was based on hearsay. (2518a-2523a, 2553a-2556a, 2577a-2578a)

Petitioner's challenges to these Rulings of the District Court were not passed upon by the Opinion of the Court below.

overruled by the Commission and the witness' testimony taken.*

Plainly, if the objections had been sustained in the first instance by the Commission, Petitioner would then have had the opportunity to meet the objections by adducing the testimony of other witnesses. None of the objections advanced was incurable.**

The ruling of the District Court denying Petitioner's motion for a new trial at which Petitioner could have adduced evidence which would have been competent by the District Court's own evidentiary standards, deprived Petitioner of his opportunity to participate in the trial of the issue of just compensation. It deprived Petitioner of that right retrospectively at a time when the evidence-gathering process had been completed and Petitioner could do nothing, barring a new trial, to satisfy the new evidentiary rulings of the District Court.

The Court below has held that the District Court "was not obliged to, although he had discretion to, remand their report to the Commissioners for a revised finding" (*infra*, 40b).

We respectfully submit that in the circumstances of this case, where petitioner justifiably relied on the Rulings of the Commission in response to Respondent's objections, the District Court did not merely have the discretion to remand, but was under the obligation, in elemental fairness to Petitioner, to do so. If, by its Rulings, the District Court was going to change the evidentiary rules under which the case was tried before the Com-

---

* Without further elaboration, we state as a fact, and the Record will demonstrate, that this witness of Petitioner was at least as well qualified and was as little subject to the objection of hearsay, as was any of Respondent's witnesses who preceded him on the stand.

** As we have said, the theory of valuation used by this expert was held by the Court below and by the District Court to have been proper. (*Infra*, 35b, 55b)

mission, and the valuation law under which the Commission assertedly decided the issues, simple fairness impelled the grant of a new trial.

Rule 53(e)(2) confers a power to "modify" and a power to "receive further evidence" together with other powers. However, it does not specify the techniques of a District Court's exercise of those powers. The incorporation of this Rule into the framework of condemnation procedure by Rule 71A did not clarify the matter.

If it be conceded, for the purpose of argument, that the affirmance below might have been correct if the District Court was viewed as a trial court in the exercise of its "modifying" power, nevertheless, the problem is not answered. If the District Court has the right under the Rule to act as a super trial court, we submit that it is subject to the ordinary rules of fair trial procedure. Where the District Court is, in effect, retrying a case, and in so doing excises portions of previously received evidence on the grounds of alleged incompetence, it must, in accordance with ordinary trial procedure, give the party who offered the evidence an opportunity to cure the evidentiary defects in question. This was not done here.

Either the District Court under Rule 53(e)(2) must operate as a reviewing court, with the traditional limited power of modification, as contrasted with the power to make wholly new findings, or it must act like a trial court, with the responsibility for according a party a fair hearing. We submit that it cannot properly invoke the powers of both roles and the responsibilities of neither.

This question poses an issue fundamental to the course of all judicial proceedings, and a party's right actively to participate therein.

It is submitted that the holding of the Court below, in the circumstances of this case, was a departure from a number of decisions of Courts of Appeal, including cases

from the Second Circuit, which in virtually identical circumstances, have held that a new trial should be afforded.

United States v. *Brooklyn Union Gas Co., supra;*
Porter v. *Leventhal,* 160 F. 2d 52, 59 (C. A. 2d, 1946).

See also:

Fountain v. *Filson,* 336 U. S. 681 (1949), reh. den. 337 U. S. 921;
Stewart v. *Southern Ry. Co.,* 315 U. S. 283 (1942), pet. for reh. gtd., and case remanded for dismissal, 315 U. S. 784;
Saunders v. *Shaw,* 244 U. S. 217 (1917);
Georgia Ry. & Elec. Co. v. *Decatur,* 295 U. S. 165 (1935).

This Court has not previously ruled upon this question. It is submitted, however, that the issue posed is so fundamental to the fair conduct of judicial proceedings, and that the Ruling below so far sanctions a departure by the District Court from the accepted and usual course of judicial review, that this Court should, in the interests of elemental justness and fairness, exercise its power of supervision over the Court below and correct the error herein presented.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JESSE CLIMENKO,
Counsel for Petitioner.

FREDERICK WIEDMAN,
CHARLES MERCER,
ARTHUR S. FRIEDMAN,
of counsel.

Appendix A.

Rule 71A(h) of the Federal Rules of Civil Procedure provides:

> "(h) *Trial.* If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it. If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (e) of Rule 53. Trial of all issues shall otherwise be by the court."

Rule 53(e)(2) of the Federal Rules of Civil Procedure provides:

> "(2) *In Non-Jury Actions.* In an action to be tried without a jury the court shall accept the master's

findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions."

Appendix B.

Report of Commission.

To Honorable Harold P. Burke, U. S. District Judge:

The undersigned having been appointed by an order of this Court on July 27, 1953, Commissioners to ascertain and determine the amount of just compensation to be paid to the persons entitled thereto in this proceeding: the said Court by subsequent order dated July 27, 1953, determined the valuation date to be December 27, 1951, the valuation to exclude any allowance for physical changes, installations or improvements made by the United States, A. O. Smith Corporation, or by a contractor for either of them between July 11, 1951 and December 27, 1951. The Commissioners were further directed to determine the fair rental value of the property from July 11, 1951 to December 27, 1951, the said rental value to be allowed as just compensation for the occupancy by the United States between July 11, 1951 and December 27, 1951, less the sums received by the defendant or his predecessor in title as rental for the period July 11, 1951 to December 27, 1951, from Commodity Credit Corporation, General Electric Corporation, Quaker Oats Company and any others.

Pursuant to said orders, the said Commissioners held the first meeting of the Commission at Room 311 Federal Building, Rochester, New York, on the 10th day of August, 1953, at 10 A. M. At that time, the undersigned Commissioners respectively duly took their oath of office and qualified to act and serve in this proceeding. That the said oaths were duly filed in the office of the Clerk of this Court on the 6th day of October, 1953. Commissioner James P. B. Duffy was selected Chairman of the Commission. The Commission then arranged with counsel to submit copies of pleadings and all memoranda made a part of the record by stipulation of the parties. Two subsequent meetings of the Commission were held before

these submissions were completed. The Commission thereupon, September 22, 1953, with consent of the parties, visited and inspected the plant and property involved in these proceedings. The Commission met to take testimony of the parties, to hear and receive the evidence at the Federal Building in the City of Rochester, New York, on

August 10, 1953
Sept. 1-29-30, 1953
Oct. 6-7-20-27-28-29, 1953
Nov. 12-13-17-18-19, 1953
March 3-4-10-11-12, 1954
Apr. 6-7-8-20-21-27-28, 1954
May 11-12-13-25-26, 1954
June 4-24, 1954
July 19-22, 1954.

The last testimony was taken on the 22nd day of July, 1954. The record consists of 4,055 pages of transcribed testimony. Over 200 exhibits were offered in evidence, of which 119 were admitted in evidence. Counsel for both sides requested opportunities to file briefs. Original briefs were filed by both plaintiff and defendant by the 27th day of August, 1954, and reply briefs were finally submitted to the Commission on the 20th day of September, 1954. The Commission also viewed the premises on the 10th day of June, 1954, and the 30th day of November, 1954. The Commission met together for the purpose of conference and discussion to make their decision and to formulate their report on July 26; August 3, 6, 13, 25; September 21, 23; October 4, 11, 15, 29; November 5, 12, 18, 23, 30; December 2, 17, 21 and 22, 1954.

The Commission respectfully submits that:

1. The lands taken by the Government in this proceeding are described in both the declaration of taking and

in the amended complaint in condemnation in these proceedings as follows:

All those tracts or parcels of land situate in the town of Greece, County of Monroe, State of New York and more particularly described as follows:

TRACT A-100

BEGINNING at a point in the West line of Dewey Avenue 33 feet distant westerly from the intersection of the center lines of Dewey Avenue and Ling Road; thence Southerly along said west line of Dewey Avenue a distance of 189.21 feet to a point; said point being 155 feet distant Northerly from the north boundary line of the Lake Ontario State Parkway; thence Westerly at right angles with the west line of Dewey Avenue a distance of 1104.9 feet to a point; thence Northerly with an interior angle of 90 degrees 38 minutes and parallel to the West line of that portion of Dewey Avenue running north of Ling Road, a distance of 1537.81 feet to a point; thence Easterly at right angles a distance of 1107 feet to a point in the west line of Dewey Avenue; thence Southerly along said west line a distance of 1360.79 feet to the point of beginning, being 39.24 acres of land, more or less.

TRACT A-100-1

BEGINNING at a point on the westerly boundary of the above described 39.24 acre parcel, said point being 755 feet northerly along the same from the southwest corner of said parcel. Running thence westerly, at right angles to the westerly boundary of said 39.24 acre parcel, 250 feet; thence northerly, at right angles, 190 feet; thence easterly,

at right angles, 250 feet to the westerly boundary of said 39.24 acre parcel; thence southerly, along said boundary, 190 feet to the point or place of beginning, being 1.09 acres of land, more or less.

TRACT A-100E1

Being a strip of land 10 feet in width, the center line of which is more particularly located as follows:

BEGINNING at a point on the northerly boundary of the above described 39.24 acre parcel where the center of an existing 6 inch water main crosses said boundary, said point being westerly along the northerly side of said parcel a distance of 475 feet from its intersection with the westerly side of Dewey Avenue. Running thence northerly, northeasterly and easterly along the centerline of said water main and through lands of John H. Odenbach a distance of 7150 feet more or less to lands of the City of Rochester, being 0.40 acres of land, more or less.

TRACT A-100E2

Being a strip of land 10 feet in width, the centerline of which is more particularly located as follows:

BEGINNING at a point on the westerly boundary of the above described 39.24 acre parcel, said point being 240 feet more or less northerly along the same from the southwest corner of said parcel; running thence in a southwesterly direction, through lands of John H. Odenbach, 135 feet more or less to an existing meter box, being 0.03 acres of land, more or less.

Appendix B.

TRACT A-100E3

Being a strip of land 40 feet in width the centerline of which follows the center of an existing spur track extending from the Main Line of the R. W. and O. Division of the New York Central Railroad Company through lands of John H. Odenbach in a general northerly and westerly direction, crossing Dewey Avenue, a distance of approximately 2700 feet to a point 90 feet more or less west of the westerly side of Dewey Avenue. Thence leaving said existing spur track and continuing through lands of John H. Odenbach, still 40 feet in width and in a westerly direction 675 feet, more or less.

Together with two strips of land 40 feet in width extending from the southerly boundary of the above described 39.24 acre parcel in a southeasterly direction, to the above described 40 foot strip running westerly from Dewey Avenue, being 3.23 acres of land, more or less.

All of the above tracts containing an aggregate of 44 acres, more or less.

The interests taken by the United States in these premises are as follows:

a. The full fee simple title to Tract A-100.

b. The fee simple title to Tract A-100-1, reserving, however, to the present owner, his grantees, assignees and licensees, the right of joint use thereof for drainage purposes, excluding, however, from such use the existing septic tank; provided such use shall not interfere with the use thereof by the United States, or its assigns or lawful occupants of Tract A-100.

c. A perpetual easement for the location, construction, operation, and maintenance of a water

line, including all right, title and interest in and to the existing water main, over Tract A-100E1, reserving, however, to the present owner, his grantees, assignees and licensees, the right of joint use of such existing water main, or any replacement thereof, provided such use does not interfere with the use thereof by the United States, its assigns or lawful occupants of Tract A-100.

d. A perpetual easement for the construction, operation, maintenance, and patrol of a power line, including all right, title, and interest in and to the existing underground conduit, over Tract A-100E2.

e. A perpetual easement for the location, construction, operation, and maintenance of a railroad spur track, including all right, title and interest in and to the existing railroad track, over Tract A-100E3, reserving, however, to the present owner, his grantees, assignees and licensees, the right of joint use of such spur track or any replacement thereof, provided such use does not interfere with the use thereof by the United States, its assigns or lawful occupants of Tract A-100.

The above described premises were acquired by the defendant, John H. Odenbach, by warranty deed from the Odenbach Holding Corporation, dated October 9, 1951, acknowledged on same day and recorded in Monroe County Clerk's Office on October 11, 1951, in Liber 2713 of Deeds at page 516.

The above 44 acre parcels of land were described in testimony and exhibits as the "direct taking" by the Government. The testimony of the witnesses for both parties disclosed that the lands described in the "direct taking" were taken from a larger parcel of land owned by the defendant. Testimony was given by both sides

relating to the damage to the remaining parcels of land, which damage was described by the experts on both sides as "severance damage."

2. Expert testimony was adduced by both sides in great detail regarding the highest and best use of the property, the value of the land, the buildings and improvements thereon and the items of property set forth in written stipulation of the parties deemed part of the real estate. Testimony was given concerning the fair market value of all the property under different theories, including the comparable sales theory, the capitalization theory and the reproduction cost new less depreciation theory. Expert testimony was given regarding the value of the land taken, both from the viewpoint of "raw" land and land with its improvements. Expert testimony was given as to damage incurred to the remaining lands by such direct taking. Expert testimony was given as to the valuation of the various interests and easements taken by the Government. The proof disclosed that, prior to the taking herein by the Government, the defendant owned some 374.20 acres of land in the Town of Greece lying West of Dewey Avenue, South of Lake Ontario and East of Island Cottage Road. Some 212 acres consisted of marsh land or land under water and some 162 acres of high land. The direct fee taking by the Government comprised some 44 acres of land lying immediately West of Dewey Avenue and fronting some 1550 feet on said avenue.

The testimony by the defendant as to damage to the remaining land was chiefly confined to the lands immediately adjacent to the taken portion and described on the map as "B" North of 34.99 acres, "B" West of 17.03 acres and "E" 18.90 acres.

On the taken area were some 12 buildings with a total floor area of 218,000 square feet. The principal buildings consisted of:

Appendix B.

A. A main building some 1055 feet long by some 137 feet wide and some 65 feet high, with a total content of some 10,548,000 cubic feet. It was constructed of steel with Robertson Protected Metal (RPM) siding and roofing. In this building are located four traveling cranes with craneways.

B. A machine shop 427 feet long, 61 feet wide and 27 feet high similarly constructed to main building, connected to the main building and containing among other things a traveling crane and craneways.

C. An administration building being principally of concrete block construction and being 152 feet long, 62 feet wide, 2 stories high, with basement.

D. In addition, there are also the following buildings: administration building wing, maintenance shop and storage garage, paint shop, lumber storage building, gate house, electric substation building, tool shed, acetylene and oxygen building, septic and disposal plant and meter pit.

E. The taken property was serviced with telephone, electric light, water, sewers (storm and sanitary), electric power, railroad siding and spurs.

F. From the evidence submitted it appears that most of the buildings on this property were constructed in or about the year 1943-44.

3. Throughout the course of the hearings many objections were made to the introduction of evidence and many briefs on the law supporting such objections were filed with the Commission by both parties.

4. At the close of the Government's case, the Government introduced in evidence over the strenuous objection of the defendant a contract of sale, Plaintiff Exhibit 43,

and a bill of sale, Plaintiff Exhibit 44, and a deed from Reconstruction Finance Corporation to the Odenbach Holding Corporation, Plaintiff Exhibit 3. The Government likewise introduced in evidence the income tax returns of the Odenbach Holding Corporation and John and Mary Odenbach for the year 1951, Plaintiff Exhibits 54 and 55, over the objection of the defendant. For the information of the Court and the parties hereto, these documents were carefully reviewed but had little influence with the Commission, in their determination of the valuation of the property herein.

5. The Commissioners always acted jointly as a Commission in attending all of the hearings and in viewing the premises and at all conference sessions in the preparation of this report.

6. The Commissioners listened to all the evidence of the witnesses and to all the arguments of counsel on both sides and to their theories of valuation of the property; the Commissioners carefully studied all of the memoranda of law submitted during the hearings and carefully read and studied the briefs submitted on both sides. The Commissioners, after giving such careful consideration to all of the evidence and after due deliberation have unanimously arrived at the following conclusions:

A. That just compensation as of December 27, 1951, for the "direct taking" of the 44 acres described as Tract A-100 together with all the improvements and buildings thereon and also including the articles set forth in the stipulation as to fixtures, together with the interests taken by the Government in Tracts A-100-1, A-100-E1, A-100-E2 and A-100-E3 is in the sum of $1,367,250.00.

B. That the damage to the remainder of the property of the defendant as of December 27, 1951, occasioned by

the "direct taking" of the Government and commonly referred to in these proceedings as "severance damage" is in the sum of $66,300.00.

C. That the fair rental value of property from July 11, 1951 to December 27, 1951, to be allowed as just compensation for the occupancy by the United States between July 11, 1951 and December 27, 1951, is in the sum of $61,200.00 less the sum of $6,221.65 received by the defendant or his predecessor in title as rental for the period July 11, 1951 to December 27, 1951.

D. That the person entitled to the foregoing compensation is the defendant, John H. Odenbach.

All of which is respectfully submitted.

Dated: Rochester, N. Y., December 23, 1954.

DONALD J. CORBETT
JOSEPH E. SILVERSTEIN
JAMES P. B. DUFFY
Commissioners

Appendix B.

Findings of Fact and Conclusions of Law.

The report of the Commission herein was filed with the Court on the 29th day of December, 1954. This Court by order dated January 24, 1955, has directed the Commissioners to file separately numbered findings of fact and conclusions of law in support of said report on or before February 7, 1955.

The Commission understands that the Court desires to have more explicit information as to the manner in which the Commissioners arrived at their final result. The original order appointing the Commissioners directed them to ascertain and determine the amount of just compensation to be paid to the persons entitled thereto.

The Supreme Court of the United States in *Olson vs. United States,* 292 U. S. 246 defines "just compensation." It states:

> "Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined. The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at by just consideration of all the uses for which it is suitable. * * *"

The same Court in *U. S. vs. Miller,* 317 U. S. 369, defines "market value" as follows:

> "Market Value is the amount a willing buyer will pay in cash to a willing seller. * * *"

The Commission does not feel that it is necessary to reiterate here the findings of fact that are implicit in its original report. The attorneys for each party have submitted to the Commission voluminous requests for find-

ings of fact and conclusions of law. The Commission has considered these requests in formulating the following findings of fact and conclusions of law:

Findings of Fact.

Number One.

The Commission Finds that the subject property was suitable and adaptable for storage and light and heavy industrial use and that the buildings on the property were constructed as permanent structures.

The testimony discloses that the subject property had been used for ship-building purposes; there was evidence that, after shipbuilding had ceased, the owner used parts of the main building for storage purposes; the proofs showed that the main portion of the property was zoned industrial and that other portions were zoned commercial and residental and that the property could be used for light and heavy industrial purposes; nearly all witnesses agreed that the highest and best use of the property was for heavy industrial purposes. The Commission considered the uses for which the property was suitable as of July 11, 1951 and needed or likely to be needed in the reasonably near future.

Number Two.

The Commission finds that just compensation cannot be found in this proceeding by the use of the comparable sales theory alone.

The Government and the defendant both stressed that there were three theories of valuation that would be helpful to the Commission to determine just compensation. These were:

Appendix B.

(A) Actual sales of comparable or similar property in the locality;

(B) Capitalization of income;

(C) Reproduction cost new less depreciation.

Nearly all of the witnesses agreed that they could find no actual bona fide sales of comparable property in the locality. The Government witness, Marx, submitted data showing all the sales he could find in Rochester and vicinity which he thought were at all comparable to the subject property. All of the sales which he thought were in any wise comparable were only comparable to one building or a combination of two buildings on this property. No evidence was submitted of sale of any property similar to the entire subject property in this proceeding. Government witness, Boehm, stated that this property was unique and that the sales method approach could not be used.

The Government offered in evidence Exhibit No. 3, being a deed from the Government to the Odenbach Holding Corporation, dated June 15, 1950; Exhibit No. 43, being a contract of sale between the Government and Odenbach Holding Corporation, dated February 20, 1950 and acknowledged May 9, 1950; Exhibit No. 44, being a Bill of Sale from the Government to the Odenbach Holding Corporation, dated June 15, 1950. These exhibits were at first excluded by the Commission but at a later date were received in evidence. All three of these exhibits were a part of the same transaction, that is, the sale of the subject property by the Government to the Odenbach Holding Corporation in June of 1950. The contract of sale recited in paragraph 2 thereof that the purchaser was to pay $175,000 as therein set forth; it further recited in paragraph 4 thereof that the purchaser had been in continuous possession of and operating the said property under one or more Government

contracts; it further contained the following language in said paragraph 4:

> "It is further stipulated and agreed that all rights and claims of the purchaser and seller against the other of every name, nature and description in any way arising out of or relating to the occupancy and use of the real and personal property to be sold hereunder, under the contracts above described or otherwise (including without limitation all rights and claims for rent, protection and maintenance, real estate taxes, water rents, sewer rents, utility bills and any and all other charges) are hereby released, remised and discharged and that neither Purchaser or Seller shall hereafter make or assert any claim or demand against the other with respect to or in connection with or arising out of such prior use or occupancy under the said contracts or otherwise;"

said contract further recites in paragraph 6 thereof that the Purchaser agrees not to resell said real property within two years without the written consent of the Seller and that no real or personal property subject to the lien of the purchase money mortgage be resold prior to the full payment of the note and mortgage, without the written consent of the Seller. The deed, Exhibit 3, recites that the stated consideration is $100 and other good and valuable consideration; it further recites that the Purchaser is not to resell the real property within two years, and that no real property subject to the lien of the mortgage be resold prior to the full payment of the note and mortgage, without written permission of the Seller; the revenue stamps on the deed are in the amount of $192.50. The Government witness, Marx, testified (see Plaintiff's Exhibit 27, page 22) that the sale of this prop-

erty for $175,000 was in no way indicative of market value and was a sale only by way of constructively concluding a long and deeply involved relationship between the Seller and the Buyer. While the Commission carefully considered the evidence of this sale in its final determination as to just compensation, it does not find that this was a free open market sale at arm's length between a willing buyer and a willing seller. The deed from the Odenbach Holding Corporation to John H. Odenbach, dated October 9, 1951, recited that it was given for the purpose of dissolution and as part of the process of liquidation and was made solely for the cancellation and retirement of capital stock of the seller. There was evidence of a close relationship between the buyer and seller. While the Commission considered the evidence of this transaction very carefully in its final determination of value, it finds that it did not constitute a free open market arms' length transaction between a willing buyer and a willing seller.

The Commission considered the evidence of all sales but did not feel that there was sufficient evidence to base its valuation on this theory alone.

NUMBER THREE.

The Commission Finds that just compensation for this property cannot be determined by the use of the capitalization of income theory alone.

The Government witness, Marx, was the only witness who used the capitalization of income theory and even he discarded that theory as it was based on submarginal use for dead storage. The Commission considered his testimony under this theory, however, as a check on its ultimate result.

Appendix B.

NUMBER FOUR.

The Commission Finds that this property cannot be valued on the reproduction cost new less depreciation theory alone.

The greater part of the testimony presented to the Commission was under the so-called reproduction cost new less depreciation theory. Government witnesses, Marx, Boehm and Friedman, testified as to the reproduction cost new less depreciation theory as did defense witness, Kosters. It may be interesting for the Court to know the results obtained by the various witnesses by the use of this method. They are as follows:

For the Government:

Value that improvements enhanced the land. Witness Marx, $661,000.

Witness Boehm, $1,337,228.10 which he termed "sound value" as of July 11, 1951, but which he later depreciated due to economic and obsolescent depreciation to the sum of $645,000.

Witness Friedman, $1,138,813, which he described as "sound value" as of July 11, 1951. This witness was not asked to testify as to market value.

Marx took Friedman's appraisal and depreciated it further for economic and obsolescent depreciation, to a figure of $661,000.

For the Owner:

Witness Kosters, $2,055,400.

The witnesses, Boehm and Friedman, seemed somewhat uncertain and at times rather confused as to whether the first figures submitted by them contained economic and obsolescent depreciation.

Appendix B.

The Commission while giving great weight to the testimony on this theory felt that it could not base its valuation solely on this theory. It agreed with and adopted the suggestion advanced by the attorneys for the Government throughout the trial of the case and as set forth in their brief (page 120) that there was no mathematical formula that could be adopted as a basis for valuation but that the Commission should consider all the evidence that would influence a prospective purchaser or seller of this property in arriving at a determination of market value and that, after giving such weight as it determined each type of evidence was entitled to, the Commission should reach its determination of fair market value. This contention of the Government seems to be supported in two of the cases which they cited: *Olson vs. United States* (*supra*); *Tishman Realty and Construction Company, Inc.*, 92 Fed. Sup. 384, aff'd 193 Fed. 2d 180. The Court in the *Tishman* case makes this significant observation at page 396:

> "* * * I would like to emphasize at this point that my award for the building in the amount I have mentioned is not based upon any one abstraction or method of valuation, nor on any one isolated circumstance or even set of circumstances. * * *"

NUMBER FIVE.

The Commission Finds that, as of December 27, 1951, a willing buyer would have given and a willing seller would have taken the sum of $1,367,250 for the entire property taken herein in the condition which it was as of July 11, 1951, excluding any allowance for physical changes, installations or improvements made by the United States, A. O. Smith Corporation, or by a contractor for either of them between July 11, 1951 and December 27, 1951.

Appendix B.

The Government witness, Marx, summed up his own testimony of values as follows:

1) Value to a speculative buyer	$400,000
2) Capitalized value based on short term storage rental	524,000
3) Value to an industrial purchaser-user	661,000
4) Replacement cost less depreciation	1,175,579

The Government witness, Haetten, testified as to sales of property in various parts of the United States and in many other sections of the world. In nearly all of these sales he described his method of operation as being similar to that of an auctioneer. He would sell at private sale or at auction all of the removable machinery and equipment for the best price he could get and then would sell the remaining real estate to the highest bidder. In no instance did he testify regarding any comparable property in the vicinity of Rochester or Monroe County. In fact, the Commission understood his testimony regarding nearly all of these sales to be one tending to prove his qualifications as an appraiser rather than as comparable sales to the subject property. He inspected the subject property once in 1948 and again in April, 1953. His opinion of market value was in the amount of $649,775.

The testimony of the witnesses, Marx, Haetten, Slade and Curre, based in great part on the comparable sales theory, was very helpful to the Commission in determining the value of land. The testimony of the witnesses under the reproduction cost new less depreciation theory was of value to the Commission in determining the amount that the improvements enhanced the value of the land and as a guide and check on its ultimate determination. The testimony under the capitalization of income theory was helpful to the Commission as a guide and check against the ultimate determination of value. The Com-

mission also took into consideration the geographical location of the property, its access to roads and railroad, and availability of utilities and existence of adequate parking facilities. The Commission also viewed and inspected the property on three different occasions but at the time of such inspections had very definitely in mind the evidence of the condition of the property as of July 11, 1951, as testified to by all witnesses, examination of the condition survey, Exhibit A, and examination of photographs, all of which revealed the condition of said property as of said date.

The ultimate determination of value by the Commission, on all the competent evidence, including physical, functional and economic depreciation of the buildings, was based on its conception of what an informed willing buyer would pay an informed willing seller for this entire property on the 27th day of December, 1951, in the condition which it was on the 11th day of July, 1951, without any allowance for physical changes, installations or improvements made by the United States, A. O. Smith Corporation, or by a contractor for either of them between July 11, 1951 and December 27, 1951.

NUMBER SIX.

The Commission Finds that the remaining lands of the owner have suffered damage as a result of the taking in the sum of $66,300 as of December 27, 1951.

The only witnesses who testified as to damage to the remaining lands of the owner, after the taking, were Marx, Haetten, Slade and Curre. Marx and Haetten testified that there was no severance damage. Slade and Curre, who are local real estate brokers, testified as to the value of the remaining lands after the taking. They used, as a guide, sales of comparable lands in the vicinity and took

into consideration the various easements acquired by the Government. Both agreed that the only severance damage was to parcels designated on the map, Exhibit 35, as "B North," "B West" and "E." They determined a value per acre for each parcel before and after the taking. Slade testified to a severance damage of $20,895, and Curre testified to a severance damage of $191,610.

The Commission, from all the evidence, determined the value per acre of each of said parcels before the taking and after the taking. The difference in said values was determined to be the severance damage to the owner.

The Commission's computation of severance damage is set forth in the following table:

Parcel	Acres	Before	After	Damage
"B" North	34 acres	2500	1250	$42,500
"B" West	18 "	1800	900	16,200
"E"	19 "	1300	900	7,600
				$66,300

Number Seven.

The Commission Finds that the fair rental value of the property from July 11, 1951 to December 27, 1951 was $61,200;

The Commission Further Finds that the defendant or his predecessor in title between the 11th day of July, 1951 and the 27th day of December, 1951 received as rental from other tenants the sum of $6,221.65.

The witness, Marx, testified that other comparable rentals for warehouse storage ran from 40¢ per square foot to 58¢ per square foot and stated that the annual fair rent should be $80,000. The witness, Curre, testified that, on the basis of his knowledge of the local light industrial rental market, the property would rent for 60¢ per square

foot. Curre further stated that as this property was adaptable for heavy industrial use and was equipped with traveling cranes, it should rent for 90¢ per square foot. He arrived at a fair annual rental of $196,000.

The parties stipulated that the defendant received the sum of $6,221.65 as rentals from other tenants between the 11th day of July, 1951 and the 27th day of December, 1951.

Based on all the testimony, the Commission found the fair annual rental of this property, which consisted of 218,302 square feet, to be 60¢ per square foot, or $130,981. This annual rental was divided mathematically to produce the rental for the period in question.

Conclusions of Law.

NUMBER ONE.

The defendant, John H. Odenbach, is entitled to judgment against the United States of America as follows:

A. For the sum of $1,367,250 as just compensation as of December 27, 1951, for the taking of the property described as Tracts A-100, A-100-1, together with all improvements and buildings located thereon, and including the articles set forth in the stipulation marked Exhibit 34, together with the interest taken by the Government in Tracts A-100-E1, A-100-E2, A-100-E3, excluding any allowance for physical changes, installations, or improvements made by the United States, A. O. Smith Corporation or by a contractor for either of them between July 11, 1951 and December 27, 1951.

B. For the sum of $66,300 as just compensation for damage to the remaining lands of the defendant as of December 27, 1951, caused by the taking herein and com-

monly referred to in these proceedings as "severance damage."

C. For the sum of $61,200 as just compensation for the fair rental value of the property from July 11, 1951, to December 27, 1951, for the occupancy by the United States between July 11, 1951 and December 27, 1951, less the sum of $6,221.65 received by the defendant or his predecessor in title as rental for the period July 11, 1951 to December 27, 1951.

All of Which is Respectfully Submitted.

DONALD J. CORBETT
JOSEPH E. SILVERSTEIN
JAMES P. B. DUFFY
Commissioners

Rochester, New York, February 7, 1955.

Appendix B.

Notice of Motion.

Pursuant to the stipulations filed both in the United States District Court for the Western District of New York (Stipulation In Re: Record on Appeal dated November 23, 1955) and in this Court (Stipulation dated February 16, 1956), the United States as appellee in this case hereby adds the notice of motion and petition dated September 15, 1953 and filed September 21, 1953 as a supplement to the record and Joint Appendix herein. Except for the formal headings, which are omitted, these documents are as follows:

NOTICE OF MOTION

SIR: Please take notice that upon the annexed Petition of John H. Odenbach, duly verified the 15th day of September, 1953, and all the pleadings and proceedings heretofore filed and had herein, the undersigned will move this Court, at a Special Term for the hearing of Motions, to be held at the Federal Building, in the City of Rochester, State of New York, on the 28th day of September, 1953, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an Order directing the distribution and payment of the sum of $500,000, heretofore deposited in the Registry of this Court by the plaintiff, in the manner and for the purposes set forth in the annexed Petition, and for such other and further relief as to the Court may seem just and proper in the premises.

Please take further notice that you are hereby required to serve upon the undersigned, at least five (5) days prior to the return date specified herein, copies of any and all

affidavits to be submitted to the Court for its consideration upon this Motion.

Dated: Rochester, N. Y., September 15th, 1953.

Yours, etc.,

FREDERICK WIEDMAN, Esq.,
Attorney for Defendant.

JOHN H. ODENBACH,
39 State Street, Rochester 14, N. Y.

GALLOP CLIMENKO & GOULD, Esqs.,

By (Signed) JESSE CLIMENKO,
A Member of the Firm,
Attorneys for Defendant, John H. Odenbach,
30 Broad Street, New York 4, N. Y.

To: John O. Henderson, Esq., United States Attorney in and for the Western District of New York, Attorney for Petitioner, 502 United States Court House, Buffalo, New York. Joseph B. Boyle, Esq., Attorneys for the County of Monroe, 400 Powers Building, Rochester, New York.

PETITION

The Petition of John H. Odenbach, one of the Defendants above named, respectfully shows to this Court and alleges:

1. Upon information and belief, the above entitled action for the condemnation of certain property situate in the Town of Greece, County of Monroe, State of New York was commenced on the 27th day of December, 1951,

by the filing in the office of the Clerk of this Court of Summons and Complaint and Notice of Condemnation. Thereafter, and on or about the 13th day of February, 1952, an Answer to the said Complaint was filed on behalf of your Petitioner, wherein it was alleged that the value of the property sought to be condemned was in the sum of $2,350,000.00.

2. On the 11th day of June, 1952, a Declaration of Taking was filed by the Condemnor in the office of the Clerk of the Court and on the same day, a check in the sum of $300,000 payable to the Clerk of the Court was deposited in the Registry of the Court, which said sum purported to represent the Condemnor's estimate of just compensation for the interests sought to be condemned herein, and was for the use of the persons entitled thereto at the time of the filing thereof. A judgment of Title and Possession was entered upon the Declaration of Taking on the 16th day of June, 1952.

3. On or about the 22nd day of September, 1952, an Amended Complaint in Condemnation was duly served and filed. Thereafter, on or about the 6th day of October, 1952, an Amended Answer was served and filed on behalf of Defendant Odenbach.

4. On the 4th day of December, 1952, a so-called "Amendment Declaration of Taking No. 1" was filed with the Clerk of this Court, together with a check payable to the said Clerk in the sum of $200,000, representing an additional estimate of just compensation for the use of the persons entitled thereto.

5. On the 13th day of February, 1953, by Order of this Court, the Declaration of Taking filed herein on June 11,

1952, was stricken and the Judgment of Title and Possession entered thereupon vacated.

6. On May 12, 1953, a new Declaration of Taking was filed with the Clerk of the Court by the Condemnor containing an estimate of just compensation in the sum of $500,000 for the interests sought to be condemned. The said amount was represented, upon information and belief, by those sums of money previously deposited by the Condemnor under its void Declaration of Taking filed June 11, 1952, and the Amendment thereto filed December 4, 1952.

7. By orders dated July 27, 1953, three Commissioners were appointed by this Court to determine the just compensation to be paid for the condemnation of the property involved therein. At the same time, December 27, 1951, was fixed as the date of taking of the said interests, and hence, of valuation thereof.

8. Title to the lands and improvements described in the Complaint in Condemnation was at the time of the commencement of the within action and at all other times relevant to this Petition vested in fee simple absolute in your Petitioner and in no other person. Your Petitioner's immediate grantor of the premises was Odenbach Holding Corporation, which conveyed the same by deed dated October 9, 1951, and recorded in the office of the Clerk of the County of Monroe, Liber 2713, p. 516.

9. At the present time, the premises sought to be condemned herein are encumbered by the following valid liens, and by no others:

A. A mortgage held by the Reconstruction Finance Corporation upon which there is presently due and unpaid the

sum of $117,000 of principal and interest thereon at the rate of four percent (4%) per annum from June 15, 1953.

B. Taxes to the County of Monroe, State of New York, the exact amount of which will be established by computation thereof to be submitted to this Court upon the hearing of this Petition.

10. Your Petitioner and his predecessors in interest have enjoyed peaceful, continuous and undisputed possession of the premises sought to be condemned herein for a period in excess of twenty years prior to the commencement of the within action. Petitioner has not sold, assigned or conveyed, or contracted to sell, assign, or convey, or in any way encumbered, except as hereinbefore mentioned, the premises herein, or the award to be made therefor.

11. There are no actions pending against your Petitioner or affecting the premises sought to be condemned, except the instant action, nor are there any judgments against your Petitioner in any court of record in this State or in any State of the United States or in any court of competent jurisdiction, which are unsatisfied of record. Your Petitioner has never made an assignment for the benefit of creditors, and no proceedings in bankruptcy, voluntary or involuntary, have ever been commenced by or against him.

12. The parties who have appeared in this action, aside from the Condemnor, are your Petitioner, as owner of the premises, and the County of Monroe, the latter making claim for certain taxes due to it. No other parties have appeared herein or made claim to any interest in the property.

13. Petitioner, notwithstanding the interposition of the instant Petition, expressly reserves the right to claim as

just compensation for the taking of the interests sought to be condemned herein, the sum alleged in the Amended Answer previously filed herein on his behalf.

14. No previous application for the relief sought herein has been made to any other court or judge, except a petition for distribution of the sum of $300,000, dated June 16, 1952. Permission for the withdrawal of that Petition was duly accorded to Petitioner by Order of this Court dated February 13, 1953.

Wherefore, your Petitioner prays that an Order be made directing the Clerk of the United States District Court for the Western District of New York to pay the sum of $500,000 from the registry of this Court in the manner hereinafter set forth:

1. To the County of Monroe, State of New York, the unpaid taxes to be established upon the hearing of this Petition, provided that any payment of Tax to the County of Monroe for the year 1952 shall be without prejudice to the rights of your Petitioner to demand a pro rata adjustment of such tax in the final judgment to be entered herein.

2. To the Reconstruction Finance Corporation, the sum of $117,000 and interest from the 15th day of June, 1953, to the date of payment thereof at four percent (4%) per annum.

3. To your Petitioner, the balance of the said sum of $500,000.

Dated: Rochester, N. Y., September 15th, 1953.

(Signed) John H. Odenbach,
JOHN H. ODENBACH,
Petitioner.

Appendix B.

STATE OF NEW YORK,
COUNTY OF MONROE, *ss:*

John H. Odenbach, being duly sworn, deposes and says: That he is the petitioner named in the foregoing petition. That he has read the said petition and knows the contents thereof. That the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

(Signed) JOHN H. ODENBACH.

Sworn to before this 15th day of September, 1953.

(Signed) ESTHER M. FITZGERALD,
Notary Public.

(Stamp) ESTHER M. FITZGERALD,
Notary Public in the State of
New York Monroe County No. 942 N. Y.
Commission expires March 30, 1955.

Appendix B.

Opinion.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 287—October Term 1955.

(Argued May 11, 1956 Decided June 12, 1956.)

Docket No. 23895

UNITED STATES OF AMERICA,

Petitioner-Plaintiff-Appellee,

—v.—

44.00 ACRES OF LAND, MORE OR LESS, SITUATE IN THE TOWN OF GREECE, COUNTY OF MONROE, STATE OF NEW YORK, and JOHN H. ODENBACH, *et al.*,

Defendants,

COMMISSIONERS JAMES P. B. DUFFY, DONALD J. CORBETT and JOSEPH E. SILVERSTEIN,

Appellants.

Before:

CLARK, *Chief Judge,* and
FRANK and HINCKS, *Circuit Judges.*

Appeals from orders of the United States District Court for the Western District of New York, entered by Judge Burke. Affirmed on Odenbach's appeal. Modified on Commissioners' appeal.

Appendix B.

PERRY W. MORTON,
Assistant Attorney General.

JOHN O. HENDERSON,
United States Attorney.

ROGER P. MARQUIS and HAROLD S. HARRISON,
Attorneys, Department of Justice, Attorneys for Petitioner-Plaintiff-Appellee.

FREDERICK WIEDMAN,
GALLOP, CLIMENKO & GOULD,
JESSE CLIMENKO and ARTHUR S. FRIEDMAN,
of Counsel, Attorneys for Defendant-Appellant.

JAMES P. B. DUFFY and DONALD J. CORBETT,
Attorneys for Appellants.

On December 27, 1951 the United States commenced this action for condemnation of 44.00 acres of land in Monroe County, New York for military purposes, as authorized by Acts of Congress, and obtained an order of immediate possession. On June 11, 1952 the Government filed a Declaration of Taking, pursuant to 40 U. S. C. Section 258a, in which it estimated the value of the condemned land to be $300,000, and it deposited this sum with the district court. On December 4, 1952, after the appellant-land owner had moved to set aside the Declaration, the Government filed an amended Declaration of Taking in which it increased the estimate of the value of the property to $500,000 and deposited an additional $200,000 with the court. On January 28, 1953, the district judge granted the appellant's motion to vacate and set aside the Declaration of Taking. On May

12, 1953 the Government filed a second Declaration of Taking in which it estimated the value of the condemned land to be $500,000. The trial judge denied appellant's motion to dismiss this Declaration.

On July 27, 1953 the trial judge appointed three Commissioners to determine just compensation for the taking of the property. The Commission held extensive hearings and filed its first report on December 23, 1954 in which it determined just compensation to be $1,488,528.35 ($1,367,250 for the value of taking; $66,300 for severance damages; and $54,978.35 for the fair rental value from July 11 to December 27, 1951). The trial judge directed the matter to be returned to the Commissioners for a more detailed statement of their findings of fact and conclusions of law. The second report of the Commissioners was filed on February 7, 1955 and, after hearing the objection thereto, the trial judge modified the Commission's finding of just compensation by reducing the amount to $760,778.35. The judge uttered an opinion that reads as follows:

"This proceeding involves property with buildings which were constructed early in World War II for the fabrication of barges for war use. After World War II, subsequent to a temporary use for an industrial purpose, the main structure was converted at substantial expense by filling in the ship canal and by installing flooring and grain bins to make it usable for grain storage. After the start of the Korean War the Government appropriated it for use in the manufacture of war material. Pertinent documents in evidence fairly demonstrate that Odenbach Holding Corporation on June 15, 1950 purchased the identical property (plus about 75 acres of adjoining unimproved land) for $175,000, and that the condemnee on October 10, 1951 (less than three months prior to the taking by the Government on December 27, 1951) purchased the identical property for about $365,000 from Odenbach Holding Corporation. The pur-

chase price involved in these sales had little, if any, influence on the award made by the Commissioners. They have determined just compensation for the taking to be $1,488,-528.35.

"It was proper to consider with other relevant factors evidence as to reproduction cost, less depreciation. The condemnee in his brief submitted to the Commissioners stated, 'It is clear that the evidence in this case establishes the propriety of but one method of valuation—that which determines the value for raw land, to which there is added the value of improvements as determined by reproduction cost new, less applicable depreciation appraisal.' Apparently the condemnee thought that his theory of the sole method of valuation had prevailed before the Commissioners. He stated in the brief submitted opposing the objections to the Commissioners' Report, 'Absent other tests for determining market value, a buyer and seller would determine the price of a piece of property by reference to the cost of reproducing it, less depreciation existing at the time of taking.' And further, as stated in the brief, 'On the whole of the Report there cannot be the slightest doubt that this is the only appropriate method for determination of just compensation.' The condemnee's case before the Commissioners was geared to that theory. He produced as his experts on the question of valuation one real estate broker who testified as to the value of the bare land without improvements. This witness frankly conceded that he was not qualified to testify as to the value of the property including improvements. The other witness was a qualified engineer who testified as to reproduction cost of the improvements, less physical depreciation. His net figure for the value of the improvements (deducting nothing for obsolescence or economic or functional depreciation, for he said there was none) was $2,055,400. This engineering witness had never bought or sold real estate. He

made no attempt to testify as to market value of the property, nor had he attempted to determine whether there had been any sales of comparable property. He relied on his own experience for his conclusion that this type of plant was not generally on the market. The total result adopting the condemnee's theory of valuation was $2,423,010 (more than two million dollars in excess of the purchase price paid by the condemnee for the identical property less than three months prior to the taking by the Government).

"Despite the statement of the Commissioners that they took into consideration all pertinent factors in arriving at their determination of fair market value, I think the amount of the award demonstrates that they erroneously arrived at their conclusion by adopting the condemnee's theory of valuation, viz., that there was no going market for the property and that land value plus reproduction cost, less physical depreciation was the sole guide. I think a mistake has been made and that the findings of the Commissioners as to fair market value are clearly erroneous, and do not have to be accepted under Rule 53(e)(2), Federal Rules of Civil Procedure. *Stubbs* v. *Fulton National Bank*, 146 F. 2d 470, 473. *Beckley National Bank* v. *Boone*, 115 F. 2d 513, 515.

"Value is the thing to be determined. Neither reproduction cost nor that less depreciation is the sole guide. There must be a reasonable judgment having its basis in a proper consideration of all relevant facts. *Standard Oil Co.* v. *Southern Pacific Co.*, 268 U. S. 146. 156.

'Original cost is well termed the "false standard of the past" where, as here, present market value in no way reflects that cost. So with repreduction cost, when no one would think of reproducing the property.' *United States* v. *Toronto Navigation Co.*, 338 U. S. 396, 403.

'It is not difficult to understand the modern apprisers skepticism of land value plus structural cost as a measure

of the market value of improved real estate. Such a figure would be acceptable only on the assumption that the buyer of the property would want to erect a substantially identical structure in case the existing one were not there. The market value of the mere land is a value that can be availed of by the owner only be erecting on it that type of building which is now best adapted to it. But if the existing building is not of that type—which is almost sure to be the case in this dynamic age, unless the structure is very new—then the improvement does not enhance the value of the whole property by the amount of the reproduction cost.' *Orgel—Valuation Under Eminent Domain.* (1953 Edition) Sec. 188.

"There is no substantial evidence to justify the conclusion that at the time of the taking there existed the prospect of a demand or need within the reasonably near future for such structures for heavy industrial use, so as to affect its market value. *Olsen* v. *United States,* 292 U. S. 246.

"Based upon consideration of all the pertinent factors having a bearing on fair market value, including comparable sales, recent sales of the identical property, capitalization of income, and reproduction cost less physical depreciation, obsolescence, and economic or functional depreciation, the determination of the Commissioners as stated in their report and findings should be modified as follows:

"1) Just compensation for the taking of the property described in the Commissioners' Conclusions of Law designated (A) is determined to be $700,000, which is found to be the fair market value of the property.

"2) Damage to remaining lands caused by the taking is determined to be $25,000.

"3) Fair rental value from July 11, 1951 to December 27, 1951 is determined to be $42,000—from which should

be deducted $6,221.65, the amount received by the condemnee or his predecessor in title as rent for the period July 11, 1951 to December 27, 1951—making a net rental value of $35,778.35.

"Making a total of $760,778.35, which is determined to be just compensation for the entire taking."

On a motion to amend his judgment, the judge uttered an opinion reading as follows:

"The question presented by this motion to amend the judgment of April 14, 1955, is what interest is due on the total award of $760,778.35. That question involves what credits against interest the Government is entitled to by reason of deposits made in the registry of this court. Deposits were made as follows:

June 11, 1952	$300,000.00
December 4, 1952	200,000.00
December 28, 1953	142,000.00
March 7, 1955	118,778.35
Total	$760,778.35

In addition the plaintiff deposited on March 7, 1955, the sum of $80,888.28 as interest.

"All of the funds so deposited were, at all times after the respective deposits were made, available for withdrawal by or distribution to the parties entitled thereto. The order of this Court holding the first Declaration of Taking invalid did not affect the availability for withdrawal or distribution of the deposits made June 11, 1952 and December 4, 1952.

"The judgment should be amended to include interest at 6% per annum on the following sums for the following periods to reflect credits due the Government on account of sums so deposited:

Interest on $760,778.35 from December 27, 1951, to June 10, 1952, inclusive;

Interest on $460,778.35 from June 11, 1952, to December 4, 1952, inclusive;

Interest on $260,778.35 from December 5, 1952, to December 27, 1953, inclusive;

Interest on $118,778.35 from December 28, 1953, to March 7, 1955, inclusive.

"This determination is made without prejudice to the right of the condemnee to claim additional interest if it shall be judicially determined that funds on deposit have been illegally or improperly withheld by the Government by reason of pending claims of the Government against the funds on deposit. This determination in so far as it is made without prejudice is so made at the request of the condemnee, and is not to be construed as any indication of the view of the Court as to the validity of any claim which may hereafter be asserted."

On February 15, 1955, the district judge entered an order fixing the compensation of the Commissioners as follows:

James P. B. Duffy, Chairman	$4,000
Joseph E. Silverstein	3,500
Donald J. Corbett	3,500

This order was re-affirmed on March 31, 1955.

The defendant land-owner and the Commissioners appeal.

FRANK, *Circuit Judge*:

I. The Defendant Land Owner's Appeal

1. Rule 71 A (h), together with Rule 53 (e) (2) gave the judge authority to reject, in part, a finding of the Commissioners if "clearly erroneous" and to modify their award

accordingly. He was not obliged to, although he had discretion to, remand their report to the Commissioners for a revised finding.

2. It is obvious to us, and it was to the judge, that, in valuing the property, the Commissioners (despite their statement that they took all pertinent factors into consideration) relied primarily on reproduction-cost-new less depreciation. The judge, in his excellent opinion, properly rejected such a valuation. We think his revised valuation is amply supported by the evidence, and that it is not "clearly erroneous."

We think it immaterial that, in revising the Commissioners' findings as to "severance" and rental values, the judge did not explicitly state that they were clearly erroneous. We think his revised findings are amply supported by the evidence.

3. On June 11, 1952, when the Government filed the first Declaration of Taking, it deposited $300,000 with the district court. On December 4, 1952, when the Government amended its Declaration of Taking, it deposited another $200,000 with the court. On January 28, 1953 the district judge vacated the Declaration of Taking on the ground that the original estimate of $300,000 as the value of the land taken was made in bad faith; 110 F. Supp. 168. The evidence showed that the Government had previously estimated the property to be worth $500,000 and had prepared a Declaration of Taking based on this estimate which was never filed. Instead, the Government filed the Declaration of Taking which contained an estimate of only $300,000 as the value of the property taken. The trial judge, in making his order vacating the Declaration, disregarded the amended Declaration increasing the estimate of value to $500,000, because the Government had not obtained his permission to make the amendment.

Appendix B.

The $500,000 deposited on December 4, 1952 with the court by the Government remained so deposited. On May 12, 1953 the Government filed a second Declaration of Taking containing an estimate of just compensation in the sum of $500,000. Appellant's motion to vacate this Declaration of Taking was denied. On December 28, 1953 the Government deposited another $142,000. On March 7, 1955, after the final order of the district court was rendered, the Government deposited an additional $118,778.35.

The trial judge awarded appellant interest in the following amounts:

Interest on $760,778.35 from December 27, 1951 (the date on which the Government entered into possession) to June 10, 1952.[1]

Interest on $460,778.35 from June 11, 1952 to December 4, 1952.[2]

Interest on $260,778.35 from December 5, 1952 to December 27, 1953.[3]

Interest on $118,778.35 from December 28, 1953 to March 7, 1955.[4]

The amount allowed by the court below as interest was calculated to the time at which the Government deposited

---

[1] This gave the appellant interest on the full amount of the ultimate judgment from the date of the Government's possession to the date it first deposited money with the court.

[2] This gave appellant interest on the difference between the ultimate judgment of $760,778.35 and the $300,000 on deposit during this period.

[3] This gave appellant interest on the difference between the ultimate judgment of $760,778.35 and the $500,000 on deposit during this period.

[4] This gave the appellant interest on the difference between the ultimate judgment of $760,778.35 and the $642,000 on deposit from December 27, 1953 until the remaining undeposited part of the final judgment was deposited on March 7, 1955.

the various amounts with the court. No interest was allowed with respect to the amounts so deposited. Under the statute (40 U. S. C. Section 258a), interest is not to be allowed on so much of the value of the condemned property as has been deposited with the district court by the Government pursuant to its filing of a Declaration of Taking.

Appellant contends, however, that he is entitled to additional interest on $300,000 from July 11, 1952 to December 4, 1952, and on $500,000 from December 4, 1952 to May 12, 1953 (the date of filing of the second Declaration of Taking). He rests his contention on the fact that the first Declaration of Taking was vacated by the district court and that, therefore, the statute does not absolve the Government from paying interest on the amounts deposited pursuant to the First Declaration of Taking and before filing of the second Declaration.

However, the district court had no power to set aside the first amended Declaration of Taking, and its order so doing is void.[5] We may concede, *arguendo*, that a court has jurisdiction to vacate a Declaration of Taking where, contrary to the implied requirements of the statute, the estimate of the value of the condemned property is made by the Government in bad faith. But here the estimate was raised to an amount which the evidence shows to have been arrived at in good faith. Indeed, the court later refused to set aside a Declaration with the same estimate. It is true that the Government did not secure the permission of the court before it amended its Declaration of Taking by increasing the estimated value of the property. It is like-

---

[5] *United States* v. *Hayes*, 172 F. 2d 677, 679 (C. A. 9); *United States* v. *Carey*, 143 F. 2d 445, 448-450 (C. A. 9); *U. S.* v. *165.1978 Acres of Land, etc.*, 61 F. Supp. 362 (E. D. N. Y.); cf. *U. S.* v. *6.74 Acres of Land, etc.*, 148 F. 2d 618 (C. A. 5); *U. S.* v. *Certain Real Estate, etc.*, 217 F. 2d 920 (C. A. 6); *U. S.* v. *Eight Acres of Land*, 26 F. Supp. 315, 319-320 (E. D. Ill.).

wise true that orderly procedure requires that it obtain leave of the court to make such an amendment. But the court should have granted the Government such leave, since the amendment could not possibly prejudice the land owner. *U. S.* v. *1,997.66 Acres of Land, More or Less, etc.*, 137 F. 2d 8 (C. A. 8); *U. S.* v. *Certain Lands in Centerline*, 47 F. Supp. 320 (E. D. Mich.). Before granting the motion to vacate the Declaration, the court was well aware of the fact that the Government had amended it. Yet it chose to rest its decision vacating the Declaration on the unamended Declaration of Taking with its lower estimate of value. We think the court erred in thus ignoring the amended Declaration and, since there was no other allegation that the Government acted without statutory authority, the court was without power to vacate and set aside the Declaration of Taking as amended.

The money deposited by the Government was at all times available for distribution at the discretion of the trial court. This was true during the interim between the dismissal of the first Declaration of Taking and the filing of the second. Before the dismissal of the first Declaration, appellant requested the court to distribute the fund but later withdrew his request. The Government could not appeal the erroneous order of dismissing the first Declaration since that order was not appealable.[6] Hence, we think applicable the many cases which hold that a deposit of a fund pursuant to the filing of a Declaration of Taking under 40 U.S.C. Section 258a, prevents the accrual of further interest on the amount deposited.[7] We think the judge's award of interest was correct.

---

[6] *Catlin* v. *United States*, 324 U. S. 229; *United States* v. *Hayes*, 172 F. 2d 677, 679, 682 (C. A. 9); *McKendry* v. *United States*, 219 F. 2d 357 (C. A. 9).

[7] See e.g., *United States* v. *53¼ Acres of Land in Brooklyn*, 176 F. 2d 255, 258 (C. A. 2); *United States* v. *City of New York*, 186 F. 2d 418 (C. A. 2); *United States* v. *Miller*, 317 U. S. 369, 381.

Appendix B.

II. The Commissioners' Appeal

The Commissioners inspected the property on three different days; they spent 38 days hearing testimony and arguments which filled 4055 pages; they received 113 exhibits in evidence; they devoted considerable time to examining the record and the exhibits and spent 25 days conferring and preparing their report. Furthermore, they spent two weeks in preparing detailed findings of fact and conclusions of law at the request of the district court. For this labor, the district court allowed a total of $11,000 as compensation.

The judge's awards to the Commissioners are too low. Two of the Commissioners are practicing attorneys, and the third is an insurance broker. We think that each of the Commissioners should receive $10,000, and that the Chairman should be reimbursed for his expenses.

Affirm on Odenbach's appeal; modified on the Commissioners' appeal.

CLARK, *Chief Judge* (concurring):

I concur entirely in the opinion on the landowner's appeal; and since the matter is not of permanent significance, I have finally determined to concur in the result on the commissioners' appeal. I agree that the amounts awarded the commissioners by the district judge were quite low for professional services and that we ought not to penalize the commissioners because their erroneous conception of governing principles robbed their work of much of its effectiveness—though it is difficult to see why they persisted after the very direct admonition implicit in the judge's return of the matter to them for more adequate findings. But having in mind the range of discretion vested in the judge and the amounts payable in comparable cases in New York

and in the T. V. A. condemnations, I think a doubling of the awards made below would have been quite generous. I fear that so substantial a cost of proceedings so considerably abortive will prejudice the future use of the often convenient state practice of valuation by commissioners in governmental taking of private property. For under F. R. 71A(h)' either party may claim trial by jury, and the judge has only a very limited power (which he will naturally be hesitant to exercise) to override such claim.

Appendix B.

Judgment.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 12th day of June, one thousand nine hundred and fifty-six.

Present: HON. CHARLES E. CLARK, Chief Judge,
HON. JEROME N. FRANK,
HON. CARROLL C. HINCKS,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

44.00 ACRES OF LAND, etc.,
Defendant-Appellant,

COMMISSIONERS JAMES P. B. DUFFY, et al,
Appellants.

Appeal from the United States District Court for the Western District of New York.

Appendix B.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment and orders on Odenbach's appeal be and they hereby are affirmed; and the orders on the Commissioners' appeal be and they hereby are modified in accordance with the opinion of this Court.

A. DANIEL FUSARO,
Clerk.

Appendix B.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

44.00 ACRES OF LAND, More or Less, Situate in the Town of Greece, County of Monroe, State of New York,
Defendant,

JOHN H. ODENBACH,
Defendant-Appellant.

Petition for Rehearing.

Appellant, Odenbach, respectfully petitions for a rehearing of his appeal which was decided by this Court (Clark, Ch. J., Frank and Hincks, Circuit Judges) on June 12, 1956.

The basis of the determination of this appeal, as set forth in the Court's Opinion, nakedly projects two new questions, new to this case, and new to the law.

The Court holds that appraisers could not rely "primarily" on proof of value related to cost of reproduction less depreciation, in spite of the fact that the Record shows that the property is a specialty. Since not even the Appellee ever tendered such a contention,* the conclusion of law reached by the Court is new and projects the first basis for this Petition.

---

* Appellee's whole argument proceeded on the assumption that primary reliance had to be placed on reproduction cost testimony. Appellee diverged from Appellant's position only with respect to the extent of deductions necessary to convert such appraisals into market value appraisals. See Appellee's Brief, P. 2.

Secondly, the Court holds that the District Judge's findings of value, presumably on a Record from which all testimony of cost of reproduction less depreciation should be substantially disregarded, and which contains no independent evidence of value, can be made without a new trial, and will be affirmed in this Court, absent a showing of manifest error on the part of the District Judge.

Apart from problems of procedural fair play, this ruling also projects a new enunciation of law, since it permits, under the guise of an inclination on the part of an Appellate Court to affirm the finding of a District Judge in the absence of a clear error on his part, an adoption of his findings, when those findings are made without proof, and constitute no more than a guess at value.

The points hereafter made are, despite the reproduction and adoption by this Court of the District Judge's Opinion, not by one whit diluted by the assertion in the Opinion of the District Court that the Record contained proof of two prior sales. The "prior sales" referred to by the District Judge were transactions involving this parcel, to be sure; but the heavily proved point, made on the Owner's behalf, that these transactions were not sales in a fair market, and, in fact, were not sales at all, but merely represented in one instance the compromise of a controversy between the Owner and the Condemnor, and in the second instance merely a required reporting of that compromise for tax purposes after a dissolution and liquidation of the owner corporation, has never been disputed by any proof, and we cannot believe have been accepted by this Court as evidence of the existence of a market.

(1)

There is no proof of comparable sales. That was the premise of the trial of the case, and that premise has not changed. Against that background this Court's Opinion

holds that the Commission's Findings were clearly erroneous because the Commissioners "(despite their statement that they took all pertinent factors into consideration) relied primarily on reproduction-cost-new less depreciation."

This holding is a significant departure from previous authority. This Court concludes, as a general proposition and without qualification, that primary reliance on reproduction cost new less depreciation testimony is clearly erroneous.

With all due deference, it is submitted that this holding is in direct conflict with a line of adjudications of this and other Courts which establish that where no market exists for a property and the property is a specialty property, primary reliance on reproduction cost new less depreciation testimony is not only permissible, as a matter of law, but it is well nigh inevitable.

> "It is only where property is unique and there are no comparable sales, that reproduction value less depreciation should be considered as evidence of value." (Appendix 2550a, *Appellee's* Requested Findings of Fact and Conclusion of Law, and cases cited therein.)

If this line of authority is conceded to represent sound law, then, as applied to the *undisputed* facts of this case, the Commission could not have been in error in relying primarily on reproduction cost new less depreciation testimony. Appellee's own witness Boehm stated: (Appendix: 1459a-1460a.)

> "Mr. Corbett: Do you consider that this property is unique and cannot be valued in the usual manner?
>
> The Witness: I certainly do.
>
> Mr. Corbett: Therefore, you do not feel that the willing buyer and willing seller approach is the proper approach to valuation?
>
> The Witness: Not from the sales angle."

Appendix B.

The testimony of similar substance of the other witnesses is referred to at pages 58 and 59 or our original brief.

Without dispute, the issue of whether a market exists or whether the property is a specialty property is an issue of fact. The quotation from Boehm's testimony set forth above shows, *per se* (coming as it did from the Governmen's own witness), that it could not possibly have been *clearly* erroneous for the Commission to have agreed with that proposition—the proposition which the Government had steadily maintained throughout its case by the witnesses it presented.

Surely, this Court's experience in condemnation cases establishes the fact that rarely, if ever, does the condemnor introduce reproduction cost new less depreciation testimony if there is the slightest possible basis for convincing a tribunal of the existence of a market and the consequent utility of comparable sales and income capitalization testimony. That three of the Government's four opinion witnesses* here testified on the basis of such reproduction cost new less depreciation established that this was a case properly to be decided on the basis of such *valuation* testimony.**

We submit that the commissioners did not commit error, and we respectfully suggest that the action of this Court, holding explicitly that they did commit error, is at variance with all pertinent precedents.

(2)

Alternatively, and assuming for the purpose of this Petition that the Commission did rely primarily on repro-

---

* The fourth, Haetten, testified on salvage value.

** Together of course with relevant non-opinion evidence such as testimony relating to physical facts and conditions.

duction cost new less depreciation testimony, and that such primary reliance was erroneous, as a matter of law, we respectfully submit that it was impossible for the District Court to make a new finding of value on the basis of the existing Record, limited, as it was, by the admonition that no important reliance could be placed on reproduction cost less depreciation testimony. There simply was no evidence in the Record on any theory of valuation other than that of reproduction cost new less depreciation. The Commission specifically found that there was no evidence before it of comparable sales (2560a, 2565a). *These Findings were not rejected by the District Judge* (2527a, 2528a). On the basis, therefore, of the District Judge's own rulings it was impossible to fix revised Findings of value consonant with the holding of this Court discussed in (1) above. If the basis of the opinion evidence brought into this case initially by the Government was wrong, we submit that not only did the District Judge have "discretion" to remand or retry the case, but he was "*obliged*" to do so for lack of any other basis of evidence on which to make an award.

Nothing which has been argued or suggested by Appellant in this case was intended in any way to militate against the authority and indeed the responsibility, of the District Judge and this Court to exercise supervision over the proceedings of the Commission. Even if we concede that where the District Judge entertains an intuitive apprehension that the Commission has made an overgenerous award, that such apprehension can properly be embodied in a rejection of the award (absent error in the Record itself, to which the apprehension could be expressly attributed), nevertheless, beyond that the Court could not possibly go.

It is one thing to reject the Findings of another tribunal in the exercise of a supervisory role. It is, however, an

entirely different matter to create and substitute affirmative judicial fact findings for the findings which have been rejected. The latter function can only be discharged, judicially, on the basis of competent proof in the Record. According to the law of this case, there was no such proof in the record.

It is pointless to dispose of the appeal by saying that the only question is whether the District Court was guilty of manifest error. That is not the question. The question is, once it is determined that the basic proof adduced by both parties shall be disregarded, whether anything is left on which the District Judge could find a value. Since there is nothing left except a description of the property, the record did not convey facts on which a valuation could be made. That is why a new trial was required.

To sum up: if the evidence on reproduction cost less depreciation tendered by both parties, should be disregarded, as this Court now holds, then the District Court's guess as to value—and it is a guess unrelated to any proof—is substituted for a trial. The guess is then insulated from review by a holding that it will not be disturbed unless manifestly wrong. But since there is nothing in the Record, as deleted, to show that it is right or wrong, it is exempt from review. The end result in this case is that the Owner is deprived first of a hearing, and then of any right of review on appeal.

Justice requires that opportunity be given to Appellant to furnish any other testimony he can produce as to value aside from testimony of reproduction cost new less depreciation. This is especially so since the testimony of his chief valuation witness, Kosters, was accepted by the Commission and later stricken in its entirety by the District Judge after the proof was closed.

We respectfully urge that these considerations could prompt this Court to direct a new trial or the taking of further testimony.

Conclusion

Wherefore, for the reasons set forth above, Appellant prays that this Court reconsider its decision herein and grant rehearing of this appeal as to the matters set forth above.

Respectfully submitted,

Gallop Climenko & Gould
Attorneys for Defendant-Appellant.

Certificate of Counsel

The undersigned, attorney for the petitioner herein, hereby certifies that in his opinion there is good ground for the foregoing petition, that it has been presented in good faith and not for the purpose of delay.

New York, N. Y., June 20, 1956.

Gallop Climenko & Gould

By Jesse Climenko, of Counsel

Appendix B.

Decision Denying Petition for Rehearing.

U. S. COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

vs.

44,000 ACRES OF LAND, MORE OR LESS SITUATED IN THE TOWN OF GREECE, COUNTY OF MONROE, STATE OF NEW YORK,

JOHN H. ODENBACH.

On Petition for Rehearing

We did not mean to say, in our opinion, that the cost of reproduction is not a relevant factor to be considered, in appropriate cases, in determining the value of the condemned property. We did say that the trial judge correctly rejected the undue weight placed on this factor of valuation by the Commissioners, and that he properly fixed the value of the property here involved.

The petition for rehearing is denied.

CHARLES E. CLARK
Charles E. Clark, C. J.

JEROME N. FRANK
Jerome N. Frank, C. J.

CARROLL C. HINCKS
Carroll C. Hincks, C. J.

Dated, July 2, 1956.

Appendix B.

Order Denying Petition for Rehearing.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the Second day of July, one thousand nine hundred and fifty-six.

Present: HON. CHARLES E. CLARK,
Ch. J.
HON. JEROME N. FRANK,
C. J.
HON. CARROLL C. HINCKS,
C. J.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

44.00 ACRES OF LAND, COUNTY OF MONROE, STATE OF NEW YORK,
Defendant,
JOHN H. ODENBACH,
Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellant.

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO,
Clerk.

Appendix B.

Clerk's Certificate.

UNITED STATES OF AMERICA,

SOUTHERN DISTRICT OF NEW YORK.

I, A. DANIEL FUSARO Clerk of the United States Court of Appeals for the Second Circuit, do hereby certify that the foregoing Vol. I, 1-6; Vol. II, 1a-512a; Vol. III, 513a-1040a; Vol. IV, 1041a-1560a; Vol. V, 1561a-2100a; printed portions of Vol. VI, 2101a-2611a; Vol. VII, 1b-40b, inclusive, contain a true and complete transcript of printed portions of the record and proceedings had in said Court, in the case of

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

against

44.00 ACRES OF LAND, more or less COUNTY OF MONROE, STATE OF NEW YORK,

Defendant,

JOHN H. ODENBACH,

Defendant-Appellant.

as the same remain of record on file in my office.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 21st day of August in the year of our Lord one thousand nine hundred and fifty-six, and of the Independence of the said United States the one hundred and eighty-first.

(SEAL)

A. DANIEL FUSARO,
Clerk.

By RALPH C. CURCIO,
Deputy Clerk.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Rules involved	2
Statement	3
Argument	8
Conclusion	20

CITATIONS

Cases:	
Hand Street, Matter of, 52 Hun. 206, 5 N. Y. Supp. 158	16
International Paper Co. v. *United States*, 227 F. 2d 201	11
United States v. *Certain Parcels of Land in Philadelphia*, 215 F. 2d 140	14
United States v. *City of New York*, 165 F. 2d 526	16
United States v. *49,375 Square Feet of Land in Manhattan*, 92 F. Supp. 384, affirmed *per curiam sub nom. United States* v. *Tishman Realty & Construction Company*, 193 F. 2d 180	12
United States v. *Honolulu Plantation Co.*, 182 F. 2d 172, certiorari denied, 340 U. S. 820	11
United States v. *Miller*, 317 U. S. 369	12
United States v. *Toronto Nav. Co.*, 338 U. S. 396	12
United States v. *Waymire*, 202 F. 2d 550	14, 19
Washington, State of v. *United States*, 214 F. 2d 33, certiorari denied, 348 U. S. 862	11
Miscellaneous:	
Federal Rules of Civil Procedure,	
Rule 53 (e) (2)	3, 14, 19
Rule 71A (h)	2, 4, 14, 19

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 440

JOHN H. ODENBACH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 32b–45b) is reported at 234 F. 2d 410. The opinion of the District Court has not been reported but it is set out in the opinion of the Court of Appeals (Pet. App. 34b–39b).

JURISDICTION

The judgment of the Court of Appeals was entered on June 12, 1956. A petition for rehearing was denied on July 2, 1956. The petition for a writ of certiorari was filed September 22, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, in this federal condemnation proceeding, the award of compensation by Commissioners under Rule 71A (h) of the Federal Rules of Civil Procedure was properly held by the lower courts to be clearly erroneous, and, if so,

2. Whether under the facts of this case the District Court was justified in modifying the Commissioners' award to conform to the competent evidence rather than submitting the case to the Commissioners for the third time.

RULES INVOLVED

1. Rule 71A (h) of the Federal Rules of Civil Procedure provides as follows:

> (h) *Trial.*—If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it. If a commission is appointed it shall have the powers of a master provided in

subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (e) of Rule 53. Trial of all issues shall otherwise be by the court.

2. Rule 53 (e) (2) of the Federal Rules of Civil Procedure provides as follows:

> (2) *In Non-Jury Actions.*—In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6 (d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

STATEMENT

The United States filed a complaint in condemnation on December 27, 1951, to acquire the fee simple title to one tract and perpetual easements over other tracts of land in Greece, Monroe County, New York, for the manufacture of material for the United States Air Force and for other military purposes (5a–10a).[1]

[1] Unless otherwise indicated, references are to the Joint Appendix.

The history of this property was summarized by the District Court (2572a)—and the summary was adopted by the Court of Appeals (Pet. App. 34b–35b)—as follows:

> This proceeding involves property with buildings which were constructed early in World War II, for the fabrication of barges for war use. After World War II, subsequent to a temporary use for an industrial purpose, the main structure was converted at substantial expense by filling in the ship canal and by installing flooring and grain bins to make it usable for grain storage. After the start of the Korean War the Government appropriated it for use in the manufacture of war material. Pertinent documents in evidence fairly demonstrate that Odenbach Holding Corporation on June 15, 1950 purchased the identical property (plus about 75 acres of adjoining unimproved land) for $175,000, and that the condemnee on October 10, 1951 (less than three months prior to the taking by the Government on December 27, 1951) purchased the identical property for about $365,000 from Odenbach Holding Corporation. The purchase price involved in these sales had little, if any, influence on the award made by the Commissioners. They have determined just compensation for the taking to be $1,488,528.35.

At the trial before appraisal commissioners appointed under Rule 71A (h) of the Federal Rules of Civil Procedure, the Government adduced evidence of comparable sales, recent sales of the identical property, capitalization of income, and reproduction cost less physical, functional and economic deprecia-

tion. On the basis of these considerations, the Government's evidence showed a value up to $675,000 (702a–703a, 706a, 965a, 1261a, 2338a–2339a, 2546a–2548a, 2578a).[2]

Petitioner took the position, as the District Court points out (2572a *et seq.*), that "the only appropriate method for determination of just compensation" was reproduction cost, less depreciation (2573a). Accordingly, petitioner produced only two witnesses on the question of valuation. One was a real estate broker, Lucien A. Curre, who frankly conceded that he was not qualified to testify as to the value of the property including the improvements and who limited his testimony to an opinion of the value of the land without improvements (2117a. See also 2020a, 2021a, 2106a, 2131a). The other valuation witness, Stuart F. Kosters, was an engineer who testified as to reproduction cost of the improvements, less physical depreciation, arriving at a figure of $2,055,400.00 (1762a–1763a).

Concerning Mr. Kosters and the application of petitioner's theory of valuation, the District Court stated (2573a):

> This engineering witness had never bought or sold real estate. He made no attempt to testify as to market value of the property, nor had he attempted to determine whether there had been any sales of comparable property. He

[2] A tabulation of the Government's valuation testimony appears in Appendix A, Example 1, to the Government's brief in the court below, designated by petitioner for inclusion in the record here.

relied on his own experience for his conclusion that this type of plant was not generally on the market. The total result adopting the condemnee's theory of valuation was $2,423,010.00 (more than two million dollars in excess of the purchase price paid by the condemnee for the identical property less than three months prior to the taking by the Government).

Following the proceedings, which filled over 4,000 typewritten pages of testimony, the Commissioners filed a report dated December 23, 1954, finding that petitioner was entitled to a total award of $1,488,528.35 (2508a–2517a). The United States filed objections, while petitioner filed a motion to confirm the report with supporting affidavits (2518a–2538a). A lengthy hearing on those motions was had before the District Court on January 24, 1955, which resulted in an order directing the Commissioners to file detailed and separately numbered findings of fact and conclusions of law (2539a). After compliance with the order by the Commission, the matter was again heard by the court on February 14, 1955. The District Court concluded (2574a) that:

> * * * the amount of the award demonstrates that they [the Commissioners] erroneously arrived at their conclusion by adopting the condemnee's theory of valuation, viz., that there was no going market for the property and that land value plus reproduction cost, less physical depreciation was the sole guide. I think a mistake has been made and that the findings of the Commissioners as to fair market value are clearly erroneous, and do not have to be ac-

DARK PAG

cepted under Rule 53 (e) (2), Federal Rules of Civil Procedure. [Citing cases.]

Consistently, and spelling out that it did so "based upon consideration of all the pertinent factors having a bearing on fair market value, including comparable sales, recent sales of the identical property, capitalization of income, and reproduction cost less physical depreciation, obsolescence, and economic or functional depreciation," the District Court on February 16, 1955, modified the award to a total of $760,778.35 (2575a–2576a).[3]

Motions by the petitioner to vacate the order modifying the findings of the Commissioners and the order ruling on objections to the Commissioners' report and findings of fact and conclusions of law were denied by the District Court after further hearing (2595a).

The Court of Appeals unanimously affirmed the award as entered by the District Court. Characterizing the opinion of the District Court as an "excellent opinion" (Pet. App. 40b), the Court of Appeals incorporated that opinion in its own opinion. It upheld the authority of the District Court to modify the findings of the Commissioners, approved the need

[3] As the cited record reference shows, $700,000.00 of this amount was found to be the fair market value of the property; damage to the remaining lands caused by the taking was determined to be $25,000.00; and fair rental value from July 11, 1951, to December 27, 1951, during which time the Government was in possession of the property, was determined to be $42,000.00 from which there was to be deducted $6,221.65—the amount received by the condemnee or his predecessor in title as rent during that period—making a net rental recovery of $35,778.35.

405686—56——2

BLEED THRU

for modification on the facts of the case, and held that the revised findings of the District Court are amply supported by the evidence (Pet. App. 39b–40b).[4]

ARGUMENT

This case is not, as the petitioner would have it appear, one of an arbitrary modification of Commissioners' findings on the part of the District Court. Rather, as the two lower courts agree, it is merely an instance of appropriate action, both within express authority conferred upon the District Court and within the power and discretion—indeed, the duty—inherent in the court to make the award conform to the competent evidence in the case. Petitioner persists here, as he did at the trial of the case, in overlooking the factual deficiencies in his own evidence. On that foundation he erroneously constructs a legal issue. That legal issue necessarily falls when the evidence is considered.

Thus, in an effort to obtain review of what is primarily a factual question, i. e., the need to apply functional and economic depreciation in valuing the particular property here involved, petitioner seeks to lead this Court away from the basic issue which confronted the District Court by asserting that the property involved "was a modern unit very adaptable to heavy industry and without any functional depreciation" (Pet. 7). The two courts below found otherwise. The evidence they relied on is competent

[4] On a separate appeal by the appraisal commissioners as to the amount of compensation awarded to them for their services, the Court of Appeals modified the award to them (Pet. App. 44b–45b). That matter is not involved here.

DARK PAG

and substantial. The property involved was a plant constructed in wartime for building barges [5] and had been converted by petitioner himself for dead storage space (2572a; Pet. App. 34b). Large expenditures of money were necessary to rehabilitate the plant before it could again be used for industrial purposes.[6] The plant was a marginal-use facility with a bad layout for any normal use in peacetime (178a, 182a–183a, 193a, 462a, 682a, 684a, 687a–689a, 693a–695a)[7] The structures had poor and unsafe features (693a, 695a, 1195a–1196a, 1220a, 1227a–1229a, 1337a, 1478a, 1483a, 1488a, 1493a–1494a).[8] There was inadequate

[5] Following the wartime need, this and hundreds of similar facilities became a drug on the market. They were sold as surplus property at the best price available in the market, usually at but a fraction of the original construction cost. As was pointed out at the trial: "* * * the property was placed on the open market for sale to any buyer that desired it" and it was sold by the Government after advertising "for the most money it could get for it after it attempted to sell it four years" (Appendix B, pp. 64, 77, to the Government's brief in the court below, designated by petitioner for inclusion in the record here; 1542a, 1553a).

[6] For example, it was necessary for the Government to spend some $133,000.00 to place cranes and craneways in safe condition for operation (2542a, 2578a). Also, some $60,000.00 was required to make repairs to roof, windows and window sashes and installation of mullion strips (Ibid.).

[7] The main building, a structure 1,055 feet by 137 feet, embracing 144,000 square feet "contained no plumbing, toilet facilities, or heating system [although in upstate New York]" and "the premises did not have facilities for the use of gas which might be purchased from a public utility" (2540a–2541a, 2578a).

[8] Thus it was testified that weight load capacity of floors was less than required under acceptable standards (1220a) and that foundation walls were unsafe (1220a).

BLEED THRU

plumbing (183a). There was only the high roof with no ceiling so that a ceiling had to be installed (177a–178a; Pl's Exhibit 1–w). The plant was excessive in size and capacity as shown by the fact that at the time of the taking only part of the space in the main building had been rented (694a). The equipment was antiquated (166a, 170a–171a, 362a–363a, 365a, 368a–380a, 384a, 397a, 1300a, 1854a–1856a). Finally, the economic situation had changed from an all-out war situation where such marginal-use plants were needed to a situation where the only available demand for such facility was for storage purposes and even that was limited.

Against this competent evidence necessitating functional and economic depreciation, petitioner's sole witness to over-all value, Mr. Kosters, testified that the only element of depreciation present was physical (1759a–1760a). While at this point in the record Kosters purported to have considered the matter of functional depreciation and found none, later he stated more frankly: "* * * I make no attempt to evaluate any factors other than the physical factors in my appraisal" (1815a). It is evident from his full testimony, as the courts below found, that market value was not his objective (Pet. App. 35b–36b; also see *infra,* pp. 12–13).

Therefore, the facts of this case compelled some deduction for functional and economic depreciation. Moreover, they would reasonably lead one to reduce very materially the result which reproduction cost

DARK PAGE

less mere physical depreciation would indicate.[9] But the Commissioners did not do this. Even after the case was returned to the Commissioners for detailed findings and conclusions, their report did not discuss these factors beyond mere mention. Indeed, in summarizing the valuation of government witness Marx, they eliminate the vital elements of functional and economic depreciation (2565a). No explanation for this excision was given nor did their report elsewhere suggest any reason either in law or in fact why such factors were put aside in this case.[10] Thus, without further ground, the District Court was required to overturn the award of the Commissioners and, that being so, the basic charge by petitioner of error in the ruling must fall.

But there is further ground in the evidence relied upon by the Commissioners which required the ruling. As the District Court stated in its opinion, approved

---

[9] Commissioner Corbett asked Edward C. Boehm [President of General Appraisal Company, Inc., Buffalo, New York, and a civil engineer with extensive experience as an appraiser of structures of all kinds (1091a–1097a, 1159a, 1162a)]: "Would any reasonable man in ordinary times reproduce this or any like property?" Mr. Boehm answered: "He would be very foolish if he did" (1434a).

[10] The generalization (2566a; Pet. 9) that the Commission's determination was based "on all the competent evidence, including physical, functional and economic depreciation of the buildings * * *" is no better than opinion assertion of an expert witness contrary to known fact. "Opinion evidence without any support in the demonstration and physical facts is not substantial evidence." *State of Washington* v. *United States*, 214 F. 2d 33, 43 (C. A. 9), certiorari denied, 348 U. S. 862; *International Paper Co.* v. *United States*, 227 F. 2d 201, 205 (C. A. 5); *United States* v. *Honolulu Plantation Co.*, 182 F. 2d 172, 178 (C. A. 9), certiorari denied, 340 U. S. 820.

LEED THRU

by the Court of Appeals (Pet. App. 36b): "I think the amount of the award demonstrates that they erroneously arrived at their conclusion by adopting the condemnee's theory of valuation, viz., that there was no going market for the property and that land value plus reproduction cost, less physical depreciation was the sole guide. I think a mistake has been made and that the findings of the Commissioners as to fair market value are clearly erroneous * * *." That just compensation is measured by the "fair market value" of the property taken and not by its cost of reproduction and the dangers to be avoided in considering the cost of reproduction without reference to "fair market value" have repeatedly been spelled out by this Court and other courts. E. g., *United States* v. *Miller,* 317 U. S. 369, 373–374; *United States* v. *Toronto Nav. Co.,* 338 U. S. 396, 403; *United States* v. *49,375 Square Feet of Land in Manhattan,* 92 F. Supp. 384, 387–388 (S. D. N. Y.), affirmed *per curiam sub nom., United States* v. *Tishman Realty & Construction Company,* 193 F. 2d 180 (C. A. 2).

Yet the effect given reproduction evidence in the proceedings before the Commissioners shows that the standard of market value was not used by the petitioner nor by the Commissioners. Neither valuation witness for the petitioner would answer questions designed to bring out market value in the sense of probable selling price for the property taken (1772a, 1838a, 2173a–2174a). Petitioner's sole witness to over-all value admitted that his instructions simply were "to appraise the physical assets on the Odenbach property which contributed to the

DARK PAGE

facilities on the property to be taken" (1835a). And, when asked, "In a condemnation proceeding for a public utility, you are never in search of market value as such, are you?", this witness replied "As such, I have never been retained in any instance" (1823a). The only over-all valuation figure given on behalf of the petitioner did not purport to be a market value figure but was, in the words of the witness (1763a):

> * * * the summation of my estimate of the cost to reproduce all of the property on the Odenbach plant as of the date of December 27, 1951, after making allowance for my estimate of depreciation from a physical standpoint, losses due to physical factors existing as of that same date.

Petitioner's own counsel confirmed the matter beyond question. Thus, he stated with reference to the $2,055,400 estimate of reproduction cost new less physical depreciation made by petitioner's witness "I have not offered this figure as a figure of market value and when I do I will properly establish it" (1759a). He never offered such a figure. Thus, the fact is that petitioner produced no evidence of market value so that the District Court correctly refused to accept the Commissioners' award which could only be supported by petitioner's evidence of reproduction cost new less physical depreciation.

In this setting, it is plain that petitioner was not "deprived * * * of his opportunity to participate in the trial of the issue of just compensation" (Pet. 20) by the rulings and action of the District Court. The power of the District Court to modify the Commis-

BLEED THRU

sioners' award on the case made is established by express terms of the "rules under which the case was tried" (Pet. 20) just as the standard of fair market value and the requirement of functional and economic depreciation were the settled "evidentiary rules" (Pet. 20) for valuation in eminent domain proceedings. Rule 71A (h) of the Federal Rules of Civil Procedure, *supra,* pp. 2–3, provides that the findings and report of commissioners "shall have the effect, and be dealt with by the court in accordance with the practice prescribed" in Rule 53 (e) (2), F. R. C. P., *supra,* p. 3, covering reports of masters. *United States* v. *Waymire,* 202 F. 2d 550, 553 (C. A. 10); *United States* v. *Certain Parcels of Land in Philadelphia,* 215 F. 2d 140, 145–146 (C. A. 3). Rule 53 (e) (2) expressly provides, with reference to a master's report, that if the findings are "clearly erroneous", "The court after hearing may adopt the report *or may modify it* or may reject it in whole or in part or may receive further evidence or may recommit it with instructions." In the instant case the District Court, after "consideration of all pertinent factors" (2575a) was of the opinion that the Commissioners had made a mistake and that their findings were "clearly erroneous" (2574a). Accordingly, the District Court modified the award by the Commissioners (2575a–2576a).

Petitioner's argument that the District Court should have recommitted the case to the Commission or have had it retried to a jury, or have heard further evidence itself, would render meaningless the language of the foregoing rule. Petitioner's sugges-

DARK PAGE

tions are only permissible alternatives. Before those alternatives are even stated, the rule provides, with respect to the report, that the court "may modify it or may reject it in whole or in part." The rule then goes on "*or* may receive further evidence *or* may recommit it with instructions."

Petitioner's arguments also ignore the factual setting of the instant case. For the reasons we have given, the court could not correctly enter judgment for the amount awarded by the Commissioners. Therefore, there remained the discretionary function whether to modify that award or to resubmit the matter to the Commissioners or to take additional evidence itself. As is customary in trials before commissioners, where there is no judge to limit the evidence, the parties had presented their cases in great detail and from every approach they believed desirable.[11] The trial proceedings extended over a total of 18 months and the transcript of testimony covered over 4,000 pages. The case had already been referred to the Commissioners for a second time. In

[11] As an example of the full opportunity for presentation of the case, the Chairman of the Commission stated, *inter alia*, "counsel for the defense [petitioner here] may have ample time and opportunity to present whatever he thinks is required and which counsel deems necessary to protect his client's case" (2498a). A member of the Commission, addressing petitioner's counsel, also stated: "I might make it perfectly clear, counsel, that if there is any further testimony that he feels should be presented on his behalf as a result of this ruling [re admissibility of evidence of prior sales], the Commission is more than willing he should be given every opportunity to produce it" (2499a). Similarly, the petitioner was accorded ample opportunity to present his contentions to the District Court in proceedings on January 24, 1955, February 14, 1955, and March 15, 1955.

BLEED THRU

view of this record, it might have approached an abuse of discretion to have resubmitted the matter to the Commissioners for further prolongation of the proceedings. There is discretion in trial courts to limit the number of times a party may develop his case. Plainly, the only appropriate action was modification of the award on the record made, to reflect the clearly existing functional and economic depreciation and to adjust the award to fair market value. This is accepted judicial practice. Thus, in *United States* v. *City of New York*, 165 F. 2d 526, 531 (C. A. 2), the court made it clear that for "the judge to proceed upon the evidence already taken" before commissioners is perfectly proper. Similarly, in *Matter of Hand Street*, 52 Hun 213, 5 N. Y. Supp. 158, 161, the court spelled out that it should be guided in its correction of an award by a commission "by the evidence presented before the commissioners bearing on the question of damages."

Petitioner complains (Pet. 13) of the amount awarded for severance damage or for rental value for a five-month period, asserting that the court did not even hold that the Commissioners' findings as to these items were clearly erroneous. The amount of these items is to be determined by reference to fair market value, hence these findings were embraced within the District Court's conclusion that the Commissioners' findings "as to fair market value are clearly erroneous" (2574a). And, in sustaining the Government's requested finding of fact number 20 concerning rental value (2543a, 2578a), the District Court obviously found that the Commissioners' find-

DARK PA

ing of rental value in the amount of $61,200 (2567a)—nearly double the amount stated in the sustained finding—was "clearly erroneous." Certainly, when it appeared that the Commissioners' determination of fair market value for the property was excessive for failure to consider essential elements of that value it followed that the award for rental value as well as for severance damages had to be adjusted to fair market value.

By disregarding language used by the Court of Appeals and by attributing the wrong reason to that court's action, petitioner would have this Court reach an erroneous conclusion. Thus, petitioner states (Pet. 14) "The Court below did not properly discharge its responsibility for reviewing the correctness of the District Court's rejection of the Commission's Report, by affirming the District Court's Opinion on the basis of a holding that the District Court's substitute findings were not in themselves clearly erroneous. * * *" But the Court of Appeals makes it clear that it is in agreement with the District Court that the findings of the Commission were clearly erroneous. Thus, immediately preceding the language to which the petitioner takes exception, the Court of Appeals states (Pet. App. 39b–40b):

> Rule 71 A (h), together with Rule 53 (e) (2) gave the judge authority to reject, in part, a finding of the Commissioners if "clearly erroneous" and to modify their award accordingly. He was not obliged to, although he had discretion to, remand their report to the Commissioners for a revised finding.

GE BLEED THRU

> It is obvious *to us,* and it was to the judge, that, in valuing the property, the Commissioners (despite their statement that they took all pertinent factors into consideration) relied primarily on reproduction-cost-new less depreciation. The judge, in his excellent opinion, *properly rejected* such a valuation. * * * [Emphasis supplied.]

Thus, the affirmance was based on express concurrence by the Court of Appeals that the Commissioners' findings were "clearly erroneous." The fact that the Court of Appeals went on to express its view that the District Court's revised valuation is amply supported by the evidence and that it is not "clearly erroneous" in no way alters the basis of the affirmance. And, rather than indicating an improper discharge of its responsibilities by the Court of Appeals, it demonstrates a thorough discharge of its duties by that court. The Court of Appeals both found that the District Court properly rejected the "clearly erroneous" findings of the Commission and that the District Court's own findings were amply supported by the evidence and were not clearly erroneous.

The decisions below do not conflict with the decisions of any other court. The cases, relied upon by petitioner (Pet. 10), in which the courts did not overturn the commissioners' reports because of the particular facts involved in them, announce no rule against modification generally and establish no precedent applicable to the different facts in the present case. Petitioner's citations relating to the "weight" of the evidence (Pet. 12) and relating to findings "amply supported by the evidence" (Pet. 13–14) do not apply here where the ruling was based on lack

DARK PAG

of competency rather than the weight of the evidence. The decision in *United States* v. *Waymire,* 202 F. 2d 550, 553–554 (C. A. 10), which petitioner asserts is in conflict with the decision here (Pet. 18), on the contrary, spells out the broad power of review under Rules 71A (h) and 53 (e) (2) in full support of the decisions below, as follows:

> * * * Under the plain language of Rule 53, it is the duty of the court to accept the findings of fact made by a master unless they are clearly erroneous. But the findings of a master may be modified in part, or rejected in toto, if they are clearly erroneous. In like manner, under the equally clear language of Rule 71A (h), the findings and awards of a commission shall be accepted unless they are clearly erroneous. But they may be modified in part, or rejected in toto, if they are clearly erroneous. And even though there is evidence to sustain findings of a master or a commission, as the case may be, they are clearly erroneous if the reviewing court on the entire evidence has the definite and firm conviction that a mistake has been committed. *United States* v. *United States Gypsum Co.,* 333 U. S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746; *United States* v. *Oregon State Medical Society,* 343 U. S. 326, 339, 72 S. Ct. 690, 96 L. Ed. 978.
>
> Upon review, it was the duty of the court to accept the awards of the commission unless they were clearly erroneous in whole or in part because based upon a substantial error in the proceedings, because based upon a misapplication of the controlling law, because unsupported by substantial evidence, or because contrary to the clear weight of all the evidence. And while it was incumbent upon the court to proceed with

BLEED THRU

> due regard for these general principles, if on the whole record the court was clearly convinced that in fixing just compensation for the property taken the commission acted arbitrarily and without proper regard for the evidence, or that the awards were unsupported by any substantial evidence, or that they were against the clear weight of all the evidence, it was the duty of the court to modify them, reject them in whole or in part, receive further evidence, or recommit the matter to the commission with instructions.

Finally, decisions (Pet. 15–17) treating with the power of courts of appeals to modify the findings of facts by district courts are not helpful in these circumstances.

CONCLUSION

The case does not warrant review by this Court because the issues of fact have been correctly resolved by concurring decisions of the two courts below, the single legal issue is settled by express and unambiguous language of the Federal Rules of Civil Procedure which merely preserves historic practice, and there is no conflict of decisions. Therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted.

J. Lee Rankin,
Solicitor General.
Perry W. Morton,
Assistant Attorney General.
S. Billingsley Hill,
Harold S. Harrison,
Attorneys.

October 1956.

U. S. GOVERNMENT PRINTING OFFICE: 1956

DARK PAG

FILED
NOV 1 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 440

JOHN H. ODENBACH,

Petitioner,

and

44.00 ACRES OF LAND, MORE OR LESS, SITUATE IN THE TOWN OF GREECE, COUNTY OF MONROE, STATE OF NEW YORK,

Defendant,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

JESSE CLIMENKO,
Counsel for Petitioner,
30 Broad Street,
New York 4, New York.

FREDERICK WIEDMAN
CHARLES MERCER,
ARTHUR S. FRIEDMAN,
Of Counsel.

BLEED THRU

In the

Supreme Court of the United States

October Term, 1956

No. 440

John H. Odenbach,

Petitioner,

and

44.00 Acres of Land, More or Less, Situate in The Town of Greece, County of Monroe, State of New York,

Defendant,

against

United States of America,

Respondent.

REPLY BRIEF OF PETITIONER

The Brief for the United States implicitly acknowledges the correctness of petitioner's position on at least three of the questions presented.

A.

Respondent argues, without benefit of citation, that a finding of Commission error with relation to reproduction cost testimony in fixing market value of the lands taken in fee requires, *ipso facto*, that unrelated, independent findings of severance damage and fair rental value must necessarily also have been in error (Resp. Br., p. 16).

E BLEED THRU

This association is untenable. Severance damage, which by definition relates only to the diminished value of lands of petitioner which were *not* taken, has nothing to do with reproduction cost. The District Court made no attempt so to find nor did the Court below.

The plain fact is that the Court below sanctioned the promulgation of *de novo,* reduced determinations of severance damage and fair rental value by the District Court, to petitioner's detriment in the sum of $60,722, without any basis for suggesting that these independent aspects of the award were erroneous. This holding sanctions the completely novel proposition of the District Court's power of unfettered substitution of its opinion of just compensation for that found by the Commission. This is contrary to the plain requirements of Rule 53(e)(2) of the Federal Rules of Civil Procedure and all relevant adjudications thereunder.

B.

Respondent's Brief argues that the power to "modify" sanctions the District Court's summary promulgation of a new award (Resp. Br., p. 13, et seq.). Unlike respondent's Brief in the Court below, there is not now a single case cited, which is claimed to constitute an adjudication that a power to "modify" imparts to the District Court the power to put itself in the shoes of the Commission and make a wholly new initial determination of just compensation. Respondent has not even discussed or attempted to distinguish the cases cited by petitioner on pages 17 and 18 of his Brief which show that the prior adjudications on this question are *contra.*

Respondent evades this fundamental issue by characterizing the District Court's action as a mechanical or ministerial performance, one which simply made the award "conform to the competent evidence in the case" (Resp.

DARK PA

Br., p. 8). But respondent's own Brief refutes that description. At page 5, respondent says that its own evidence, which was all that remained after the District Court's excision of petitioner's evidence, indicated a value not in excess of $675,000. At page 7, respondent acknowledges that the District Court fixed a value of $700,000. On the face of its Brief, respondent acknowledges that there was a *de novo* determination. This fact, together with the absence of any authority to justify this wholly new power of the District Court, required a reversal below.

C.

Respondent cites *United States* v. *City of New York*, 165 F. 2d 526, 531 (C. A. 2d, 1948) as its authority for the action of the District Judge in summarily propounding the *de novo* findings on the issues without remand to the Commission (Resp. Br., p. 16). That case is wholly distinguishable. Rule 71A(h) of the Rules of Civil Procedure was not then in effect. It was there very specifically held that the District Court could have determined the issue of just compensation in the first instance without the use of Commissioners. Under Rule 71A(h), the requirement is plainly otherwise, where, as here, petitioner demanded a trial by jury.

Furthermore, in the *City of New York* case, even though the District Court was held to have had a complete right to dispose of the issues, the Court of Appeals nevertheless remanded, with specific directions that the District Court take such further evidence on the issues as the parties desire to offer. Under Rule 71A(h), the proposition is plainly *a fortiori*, particularly where respondent acknowledges that the District Court's ruling here "was based on lack of competency" of evidence previously received by the Commission (Resp. Br., pp. 18-19).

E BLEED THRU

Conclusion

The new Federal procedures governing condemnation cases are in constant and recurring use in all District Courts. The goal of the new Rule is uniformity. The holding below sanctions a radical and far-reaching departure from the entire course of prior adjudications. The Commission form of trial is virtually destroyed. If the holdings below represent an "historic practice" (Resp. Br., p. 20), despite the absence of a single case so holding, then this Court should so state. If the holdings do not represent such practice, and to the contrary represent a fundamental deviation therefrom and a completely novel delineation of a Commission's functions, then those errors call for correction in the interests of proper and consistent judicial administration of the Federal Rules of Civil Procedure.

Respectfully submitted,

JESSE CLIMENKO,
Counsel for Petitioner.

FREDERICK WIEDMAN,
CHARLES MERCER,
ARTHUR S. FRIEDMAN,
Of Counsel.